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No. 85____

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IN THE

Supreme Court of the United States

OCTOBER TERM 1985

WEST GULF MARITIME ASSOCIATION, COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS, NEW ORLEANS STEAMSHIP ASSOCIATION, NEW YORK SHIPPING ASSOCIATION, INC., and SOUTH ATLANTIC EMPLOYERS NEGOTIATING COMMITTEE,

Petitioners,

—against—

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Of Counsel,
HEALY & BAILLIE

Howard M. McCormack
Counsel for Petitioner
West Gulf Maritime Association
29 Broadway
New York, New York 10006
(212) 943-3980

Of Counsel,
DEASEY, SCANLAN
& BENDER, LTD.

Francis A. Scanlan
Counsel for Petitioner
Council of North Atlantic
Shipping Associations
Two Mellon Bank Center
Philadelphia, Pennsylvania 19102
(215) 569-2333

(Counsel continued on inside front cover)

Of Counsel,
A. Adgate Duer
NILES, BARTON & WILMER
Counsel for Petitioner
Council of North Atlantic
Shipping Associations
929 North Howard Street
Baltimore, Maryland 21201
(301) 539-3240

Of Counsel,
Braden Vandeventer
VANDEVENTER, BLACK,
MEREDITH & MARTIN
Counsel for Petitioner
Council of North Atlantic
Shipping Associations
500 World Trade Center
Norfolk, Virginia 23510
(804) 622-4381

Of Counsel,
WALKER, BORDELON,
HAMLIN & THERIOT

David E. Walker
Counsel for Petitioner
New Orleans Steamship Association
701 South Peters Street
New Orleans, Louisiana 70130
(504) 524-5328

Of Counsel,
LAMBOS, FLYNN, NYLAND
& GIARDINO

C. Peter Lambos
Counsel for Petitioner
New York Shipping Association, Inc.
29 Broadway, 9th Floor
New York, New York 10006
(212) 943-2470

Of Counsel,
FREEHILL, HOGAN
& MAHAR

Nathan J. Bayer
Counsel for Petitioner
South Atlantic Employers
Negotiating Committee
80 Pine Street
New York, New York 10005
(212) 425-1900

Of Counsel,
Sam P. Inglesby, Jr.
ADAMS, GARDNER, ELLIS & INGLESBY, P.C.
Counsel for Petitioner
South Atlantic Employers Negotiating Committee
P.O. Box 2364
Savannah, Georgia 31498
(912) 233-1108

QUESTIONS PRESENTED

Slavish reliance by District Courts and Courts of Appeal on the Steelworker's Trilogy, *United Steelworkers v. American Manufacturing Company*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Corporation*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel and Car Corporation*, 363 U.S. 593 (1960), has resulted in the development of a judicial presumption that because a matter was arbitrated, the arbitrator had jurisdiction to decide the issue, even where one of the parties argues the absence of an agreement to arbitrate that particular issue. The result is that courts have abdicated their responsibility to determine the threshold question of whether the arbitrator had the jurisdiction to arbitrate a particular issue, leaving this question of law for the arbitator to decide.

Petitioners believe that the time is ripe for this Court to reaffirm its prior holding in *Drake Bakeries, Inc. v. American Bakery & Confectionary Workers, Local 50*, 370 U.S. 254 (1962) that "the issue of arbitrability is a question for the courts." 370 U.S. at 256. In the case at bar, which is one of ongoing national importance to the longshore industry, the questions presented to, but disregarded by the courts below were:

1. Where local collective bargaining agreements negotiated subsequent to a national collective bargaining agreement contain substantive and procedural provisions which supplement and, in certain areas are inconsistent with the national agreement, should a court, when presented with the threshold question of which agreement applies, determine that jurisdictional issue before arbitration can be mandated?

2. May the arbitration procedures of a national collective bargaining agreement be used to vitiate the terms of subsequently negotiated local collective bargaining agreements in derogation of established principles of contract law?

LIST OF PARTIES

All parties to the proceeding below are named in the caption except for Mobile Steamship Association, Inc., and Southeast Florida Employers Port Association, Inc., Respondents-Appellants below. This information is provided pursuant to Supreme Court Rule 21.1(b). There are no parent companies, subsidiaries or affiliates of any of petitioners. This information is provided pursuant to Supreme Court Rule 28.1.

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WEST GULF MARITIME ASSOCIATION, COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS, NEW ORLEANS STEAMSHIP ASSOCIATION, NEW YORK SHIPPING ASSOCIATION, INC., and SOUTH ATLANTIC EMPLOYERS NEGOTIATING COMMITTEE,

Petitioners,

—against—

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINIONS BELOW

The opinion of the Court of Appeals is reported at No. 84-7828 (2d Cir., April 15, 1985) and is set forth in the Appendix, *infra*, pp. 1a-14a. The decisions of the United States District Court for the Southern District of New York are reported at 594 F. Supp. 670 ("Sand I") and 605 F. Supp. 723 ("Sand II"). They appear in the Appendix, *infra*, pp. 16a to 30a, dated October 4, 1984 and pp. 5a-15a, dated February 19, 1985.

STATEMENT OF GROUNDS FOR JURISDICTION

1. The opinion of the Court of Appeals for the Second Circuit was entered on April 15, 1985.

2. The Court has jurisdiction to review the opinion in question by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

Section 301(a) of the 1947 Labor Management Relations Act, 29 U.S.C. § 185a, provides as follows:

> (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Sections 9 and 10 of the 1947 Federal Arbitration Act, 9 U.S.C. §§ 9 and 10, provide as follows:

> *Section 9*
>
> If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the applica-

tion shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a non-resident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

* * *

Section 10

In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the aribtrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

STATEMENT OF THE CASE

Identification of Parties

The West Gulf Maritime Association (hereinafter "WGMA"), the Council of North Atlantic Shipping Associations (hereinafter "CONASA"), New York Shipping Association, Inc. (hereinafter "NYSA"), New Orleans Steamship Association (hereinafter "NOSSA"), and South Atlantic Employers Negotiating Committee (hereinafter "SAENC") are various associations of employers dealing with the International Longshoremen's Association, AFL-CIO (hereinafter "ILA") in the various ports represented by these associations from the Northeast United States through the Gulf Coast. They are all parties to a master contract with the ILA covering a limited number of items as well as parties to local agreements with the ILA Districts and its affiliated local unions covering the ports represented by the employer associations.

Initial Litigation

The Master Collective Bargaining Agreement (hereinafter "Master Agreement") between the various Associations and ILA, dated September 26, 1983, covers major issues of wages, contributions to the welfare plans, *etc.* It includes a Containerization Agreement (hereinafter "Master Containerization Agreement" or "MCA"), which provides in relevant part as follows: "The minimum size of the container gang needed in loading or unloading containers to or from container ships shall consist of 18 men plus 2 drivers". This language had appeared in prior MCA's since at least 1976. Subsequent to the current Master Agreement, the various Port Associations and Employer Groups entered into Local Collective Bargaining Agreements (hereinafter "Local Agreements") with the various ILA Districts and their affiliated Deep Sea Locals. Some of these Local Agreements also contain distinct Containerization Agreements tailored to local conditions that implement the

MCA language relating to container gangs. The language of these Local Agreements as to container gangs differs in the various ports. Other local agreements adopt the MCA but have been modified by separate agreements which recognize the past practices, customs of local ports and rights of Employers to assign workers within the container gang. However, the local agreements, which have survived three successive renegotiations of the MCA, supplement and vary the terms and provisions of Paragraph 5 of the MCA (essentially, the local agreements provide for various methods of utilization of the members of a container gang, including the use of those members designated as drivers).

Emergency Hearing Panel

Prior to the execution of the current Master Agreement, the parties had entered into certain other agreements as a result of the substantial revision of previous work activities and utilization of ILA labor caused by the introduction of containers in the maritime industry.

On May 4, 1981, the parties entered into an Agreement (hereinafter "Tampa Agreement"), App. at 49-51,* which established for the first time an Emergency Hearing Panel (hereinafter "EHP") with reference to the MCA. This provides that the EHP would consist of an equal number of representatives from labor and management named by the President of the ILA and by management for the purpose of hearing and resolving cases relating to the MCA. On June 19, 1981, the parties entered into another Agreement (hereinafter "Hollywood Agreement") App. at 52-58, setting forth the composition of the EHP. It also provides that an initial charge of an alleged violation of the MCA shall be heard under the procedures agreed upon in a local port by the local port association and the local representatives of the ILA.

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* References are to the pages of the appendix which are annexed to this petition.

Where there is a failure to agree on the local level or where a party desires to appeal any decision rendered at the local level, such cases are referred to the EHP. The Hollywood Agreement also provides that charges of alleged violations of the Master Agreement involving more than one port shall be referred directly to the EHP for final determination. App. at 56.

The only subsequent reference to the EHP in the agreements among the parties is contained in the Amendatory Containerization Agreement of July 29, 1983 (hereinafter "Amendatory Agreement") with regard to implementation of any action by the EHP. App. at 59-66. It provides that the EHP shall act as a Management-ILA Container Committee and that all provisions of the Hollywood Agreement dealing with implementation and enforcement of the MCA will apply with regard to the Rules on Containers. The parties, shortly after the Hollywood Agreement was executed, promulgated a series of Rules of Procedure for the EHP. App. at 39-41. Except for the above references in the Agreements among the parties and the Rules, there is no further provision covering the operation of the EHP.

EHP Meeting

A meeting of the EHP in New York on June 12, 1984, which resulted in a free for all, was called pursuant to a notice to consider, among other issues, a local dispute between WGMA and the local ILA District concerning the interpretation of a local containerization agreement regarding the composition of a container gang. App. at 32-38. This local issue was being discussed by the EHP when management contended it should be sent back to the parties at the local level for resolution under the local agreement. Suddenly, the local grievance was transformed by the President of the ILA, by alchemy, into a MCA dispute, *viz.* that the utilization of members within the container gang at all ports covered by the various Local Agreements had to be uniform. The significance of this measure was that the ILA demanded that the MCA be interpreted to mean that the MCA covered utilization of container gang members rather than fixing the minimum size of a container gang.

The substance of these discussions is set forth in minutes, App. at 31-38, that were not verbatim.[1] It was and is the consistent position of the Management Group that the sudden transformation of a local grievance at Galveston concerning the use of certain personnel in a container gang to a matter relating to the MCA was not a proper exercise of jurisdiction by the EHP. A controversial vote was taken, with management representatives opposing the ILA's position as to the EHP's jurisdiction. Management representatives, under the EHP's procedural rules, had to vote or the motion would pass by default. App. at 55. A management member from New York abstained. After heated and lengthy discussions by the management representatives, a resolution was finally issued which stated that "the minimum size of a container gang shall be 18 men plus 2 drivers and that should additional drivers be required, such drivers are to be drawn from outside the gang and shall not be part of the regular 20 man gang." App. at 38. This was in total contravention of the current Local Agreements which were negotiated after the MCA but prior to the EHP's June 12th meeting. It was also contrary to prior practices and customs which existed as far back as 1976.

The various Local Agreements with the ILA Districts and affiliated locals provide for the utilization of the members of a container gang, the designation of the number of drivers and the method in which their number shall be determined. In addition, at all ports from North Carolina to Tampa, Florida, the size of the container gang is set at 19 men, rather than 20 men. A maximum of 6 or 8 men may be utilized as drivers. App. at 42-43. The WGMA Local Agreement contains provisions providing for a minimum number of workers comprising a container gang with an agreement that the prior local customs and practices would be continued. These customs include the utilization of drivers by management.

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1 The minutes of the meeting reflect considerable acrimony regarding the discussions and the strong position of the management group that this was contrary to the provisions of the Local Agreements and that the EHP had no authority to vary these Local Agreements providing for utilization of men in container gangs.

The Hampton Roads Shipping Association, a constituent member of CONASA, has in its Local Agreement a clause pertaining to utilization as follows:

> When handling containers eighteen (18) men plus two (2) drivers will be used. The *utilization and placement of the men in the gang will be at the employer's discretion.*

(Emphasis supplied). In addition, SAENC and Southeast Florida Employers Port Association, by ports have language in their Local Agreements which states:

> It is recognized that the Employer has the right to utilize men in any combination of job classification for which they are qualified . . .

COURT PROCEEDINGS BELOW:

District Court I

The jurisdiction of the Federal Court below was based on the Labor Management Relations Art Title 29 USC Section 185a and the Federal Arbitration Art Title 9 USC Sections 9 and 10.

The ILA commenced an action in the United States District Court for the Southern District of New York to seek confirmation of the alleged arbitration award issued by the EHP. An oral opinion was issued by the United States District Court, Sand, J., on August 29, 1984, with a later stylistically revised opinion of October 4, 1984 reported at 594 F. Supp. 670 (S.D.N.Y. 1984). App. at 16-30. The Court neither confirmed the arbitration award, nor vacated the award as sought by WGMA and CONASA. Judge Sand remanded the matter to the EHP for clarification of the issue of the effect of the abstention and other issues. Thereafter, the ILA filed its appeal from this Opinion and Order and WGMA [and CONASA] filed a cross-appeal. The ILA appeal was withdrawn as a result of a subsequent award issued by arbitrator Arnold Zack resolving the issue of the abstention in favor of the ILA.

District Court II

Thereafter, the ILA resumed the litigation in the federal court by filing a further motion to confirm the award of arbitrator Zack and to confirm the award of the EHP of June 12, 1984.

The second action was filed not only against WGMA and CONASA but also against all other employer port associations including those who are now parties to this petition although they were not parties to the original action. The Court then considered issues that it had specifically refrained from considering in its first opinion. These matters were decided by the Court in its second opinion on February 19, 1985, Sand, J., reported at 605 F. Supp 723 (S.D.N.Y. 1985). App. at 5-15. The latter opinion denied the cross-petitions and motions of all respondents and granted the petition of the ILA to confirm the award of the EHP. Thereafter, the port associations, Petitioners herein, filed a Notice of Appeal.

Appellate Review

Both appeals were heard by the United States Court of Appeals for the Second Circuit on an expedited basis on March 18, 1985. On April 15, 1985, the Circuit Court issued its Opinion (App. at 1-4). The Court found that the appeal of the Sand I decision was non-appealable while the District Court opinion (Sand II) was perfunctorily affirmed by the Court.

Discussion of District Court Opinions

The District Court at the oral argument resulting in the Sand II decision stated it was not going to consider the oral argument as an evidentiary hearing, but would grant the parties a right to an evidentiary hearing, if requested. Such a request was made. However, the Court thereafter issued its opinion holding that it had decided all issues against the employer port associations, including the issues sought to be raised by some of them, *viz.*, whether or not they were bound by the EHP award of June 12, 1984.

The language in the Sand I and Sand II decisions utilized the term "Arbitration Award." It was clearly understood by the District Court that the EHP was a unique labor-management body which the Petitioners contend could not be considered an arbitration tribunal or panel in the commonly accepted sense of that word. The Court recognized that the issues resolved by the EHP were of substantial importance to the entire shipping industry. App. at 27. Both sides conceded that the employers represented by the port associations will incur millions of dollars of additional labor costs if the position on implementation of the MCA, as argued for by the ILA, were to be upheld.

The minutes of the EHP meeting reflect the abortive attempts by management to bring home to the Labor representatives why their proposal was in violation of the Local Agreements and beyond the jurisdiction of the EHP. The management members strongly objected to consideration of the issue by the EHP. Detailed affidavits were submitted to the District Court explaining what took place at the EHP meeting because verbatim minutes were not maintained.

REASONS FOR GRANTING THE WRIT

Preliminary Statement

There are three separate bases for granting Petitioners' writ in this case. Only one standing by itself would be sufficient cause for this court to take this case. However, taken together, these three causes mandate that this court grant this Petition.

1. The Circuit Court Ignored Established Supreme Court Precedent

In its decision, the Second Circuit ignored the key issue in this case as to whether or not manning and staffing requirements were an arbitrable issue which should have been submitted to the EHP. Petitioners' claim that the issue of manning and staffing is a local issue which is covered by Local Agreements. Any dispute arising as to manning and staffing should be resolved in accordance with the arbitration provisions contained in the Local Agreements. Respondent argues that the

issue of manning and staffing was properly submitted to the EHP for resolution.

Despite the obvious importance of this threshhold question as to the jurisdiction of the EHP to resolve this grievance, the Second Circuit never directly resolved this issue. Rather, it leapfrogged right to the question of whether or not the arbitrator's decision was proper, an issue which the court never should have considered until it had resolved the jurisdiction of the EHP.

In *Drake Bakeries, Inc. v. American Bakery & Confectionery Workers International, Local 50*, 370 U.S. 254 (1962), this Court held that the issue of arbitrability is a question for the court to resolve. It was error for both the Second Circuit and the District Court to sidestep their affirmative obligation to resolve the question of arbitrability and then proceed to rule on whether or not the arbitrator's decision was proper.

Both the District Court and the Court of Appeals failed to perceive the significant difference between the issue of whether there was an agreement to arbitrate a particular matter (substantive arbitrability) and procedural errors which arise in the course of an otherwise valid arbitration. Had those courts carefully read this Court's opinion in *John Wiley & Sons v. Livingston*, 376 U.S. 543 (1964), reaffirming its earlier decision in *United Steelworkers v. Warrior & Gulf Navigation Corporation*, 363 U.S. 574 (1960), they would have realized that:

> The threshold question in this controversy is who shall decide whether the arbitration provisions of the collective bargaining agreement survived the Wiley-Interscience merger, so as to be operative against Wiley. Both parties urge that this question is for the courts. Past cases leave no doubt that this is correct. "Under our decisions, whether or not the company was bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the Court on the basis of the contract entered into by the parties."

376 U.S. at 546-47.

Petitioners do not contend that there was no arbitration agreement. However, it is their contention that the failure on the part of the District Court to squarely address the issue of whether the parties agreed to submit this particular dispute to arbitration before the EHP, compounded by the Second Circuit's failure to review independently the issue when presented to it, amounted to an abdication of the proper role of the courts when confronted with the question of whether there was ever an agreement to arbitrate a particular issue. The Second Circuit merely read one part of the *Wiley* decision, not relevant to the issue before it. Had the Second Circuit accurately perceived the issue of substantive arbitrability, Petitioners believe it would have correctly focused on the "threshold question" as defined by this Court at the outset of its opinion in *Wiley*, namely, whether the parties agreed to submit this issue to the EHP.

At the very least, this error of law effectively permitted the EHP, and not the court, to decide whether there was an agreement to arbitrate this issue. This is akin to putting the cart before the horse and mandates a remand to the Second Circuit for a subsequent remand to the District Court so that Judge Sand can properly decide the "threshold question."

2. The Circuit Court's Deference to the EHP's Decision Has Resulted in a Contract To Which No Party Ever Agreed

While the error of law committed by the Court of Appeals is egregious enough to warrant review, the practical effect of the decision serves to compound the need for review. The Second Circuit's decision has permitted the EHP to vitiate the terms of local contracts that were negotiated subsequent to the execution of the MCA.

Even assuming *arguendo* that the MCA contained a provision pertaining to manning and staffing, which it does not, it is axiomatic that the subsequently bargained Local Agreements would rescind such a provision. *Transportation Communication Employees Union v. Union Pacific Railroad Co.*, 385 U.S.

157 (1966); *Bechtel Corp. v. Local 215*, 544 F.2d 1207, 1213 (3d Cir. 1976), *aff'g* 405 F. Supp. 370, 375 (M.D. Pa. 1975); *NLRB v. International Union of Operating Engineers*, 323 F.2d 545 (9th Cir. 1963). In this case, the ILA locals, at the behest of their members, negotiated Local Agreements with the respective port associations after the negotiation of the Master Agreement. These Local Agreements contain specific provisions pertaining to manning and staffing and/or the continuation of prior practices with respect to manning and staffing. Under the holdings in the above cited cases, these provisions should be given effect since they reflect the final agreement between the respective port associations and the members of the ILA in each port, as represented by their local ILA officials.[2] If the Second Circuit's decision is allowed to stand, it will mean that the ILA (International Union), acting through the EHP, has the authority to unilaterally determine what rights its members will have, despite the fact that local ILA union officials have negotiated Local Agreements which include provisions diametrically opposed to the interpretation given to the MCA by the EHP.

Each Local Agreement was entered into after the so-called Master Agreement was entered into. Each Local Agreement separately dealt with the assignment and utilization of workers within the twenty-man container gang. If, as the respondent claims, the ILA locals had no right to do so, then the following questions must be asked:

1. Where was the International during 1984 when these separate Local Agreements were being negotiated?

2. Were these separate contracts somehow negotiated under the cover of darkness by local affiliates disloyal to the International or was the International aware of their negotiation?

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2 The ILA is a signatory and party to two Local Agreements. They are Hampton Roads Shipping Association and Southeast Florida Employers Port Association, Inc. Therefore, Respondent ILA obviously knew the terms of at least those two local contracts.

3. If the International was aware of these negotiations which they claim would violate the Master Agreement, why did they not take steps to put their local affiliates into trusteeship as they have threatened to do on other occasions in the minutes of the June 12, 1984 meeting? App. at 35.

In sum, the ultimate question is how is it possible that one year after the current Master Agreement was negotiated, which respondent claims covers the manning and staffing assignments within the twenty man container gang, its local affiliates managed to negotiate separate agreements which make the manning and staffing assignment within the twenty man container gang into purely local matters? It should be noted that longstanding prior local practices and customs gave employers the right to determine the utilization and assignment of members of a container gang.

The court below was faced with an issue of contract interpretation which it was required to review. It failed and refused to do this. The MCA does not deal with manning and staffing. Even if it was held that the MCA dealt with manning and staffing, the negotiation of Local Agreements after the negotiation of the MCA, under basic contract law, compels the conclusion that the provisions in the later negotiated Local Agreements regarding manning and staffing supersede the MCA's provisions. *Bechtel Corp. v. Local 215*, 405 F. Supp. at 375.

While an arbitration panel has the power to interpret a contract, it does not have the right to rewrite the contract. *United Steelworkers v. Enterprise Wheel and Car Corporation*, 363 U.S. 593, 597 (1960). Yet, by ratifying the EHP's determination, the Second Circuit has permitted the EHP to rewrite the local port contracts so that the local provisions concerning manning and staffing and/or the continuation of past practices with respect to manning and staffing are written out of the contract. In short, the EHP is interpreting the MCA in a fashion that vitiates the Local Agreements which the parties

(the ILA locals and the local port associations) never intended. Therefore, the decision of the Second Circuit should be reversed. This reversal will then permit the Local Agreements to reflect accurately the agreement as negotiated between the local port associations and the members of the ILA in those local ports.

3. Recurring Issues of National Scope and Importance

The significance of this case, if it were only limited to the longshore industry, is tremendous. The EHP has limited authority to resolve specified disputes affecting 36 ports from Maine to Texas. These ports employ over 50,000 longshoremen and each year handle in excess of 50% of the cargo which is imported and exported to and from the United States. However, the impact of this case goes well beyond the longshore industry and, in fact, affects the entire economy. If the decisions of the lower courts are left undisturbed, U.S. exporters and importers will incur significant additional costs which will make U.S. exports even less competitive in world markets and increase the price of imports. If employers of longshore labor are required to hire additional drivers from outside the container gang, during the current contract year alone they will incur additional direct labor costs in excess of $47 million in wages alone which will increase in future years. This additional financial burden will be passed along directly to U.S. exporters and importers who undoubtedly will, in turn, pass those costs along to the U.S. consumer.

The underlying issues in this case are not limited to the longshore industry on the Atlantic and Gulf Coasts. In every industry which conducts its labor negotiations on a national level, there arises the same situation which is found herein. Every master contract, whether in the longshore, trucking, mining, automotive or construction industry, is supplemented or amended to some degree by local contracts which are entered into by the local parties to the master agreement in order to reflect agreements which are not covered by the master contract.

The parties to both master contracts and the local contracts which supplement and/or amend these master contracts must feel secure that any local contract they negotiate will not be set aside by an arbitration panel established pursuant to the master contract unless they explicitly cede this jurisdiction to that panel. All parties must have no doubt that the terms of local contracts will not be subject to unilateral reformation.

It is axiomatic that the specific intent of parties to a collective bargaining agreement should be given full effect. This intent is frustrated where, as here, parties to local contracts are uncertain that local contracts will be given full force and effect.

Petitioners believe that it is critical that parties to local collective bargaining agreements, negotiated subsequent to, and with the full knowledge of a previously negotiated master contract, may be assured that their local agreements will not be abrogated absent their express authority.

CONCLUSION

This Court should declare that lower Courts have an obligation to resolve the issues raised in this Petition. They should not act as rubber stamps for arbitrators' awards. For the foregoing reasons, the Petition for writ of certiorari should be granted.

Dated: New York, New York
July 12, 1985

Respectfully submitted,

Of Counsel,
HEALY & BAILLIE

Howard M. McCormack
Counsel for Petitioner
West Gulf Maritime Association
29 Broadway
New York, New York 10006
(212) 943-3980

Of Counsel,
DEASY, SCANLAN
& BENDER, LTD.

Francis A. Scanlan
Counsel for Petitioner
Council of North Atlantic
Shipping Associations
Two Mellon Bank Center
Philadelphia, Pennsylvania 19102
(215) 569-2333

Of Counsel,
A. Adgate Duer
NILES, BARTON & WILMER
Counsel for Petitioner
Council of North Atlantic
Shipping Associations
929 North Howard Street
Baltimore, Maryland 21201
(301) 539-3240

Of Counsel,
Braden Vandeventer
VANDEVENTER, BLACK,
MEREDITH & MARTIN
Counsel for Petitioner
Council of North Atlantic
Shipping Associations
500 World Trade Center
Norfolk, Virginia 23510
(804) 622-4381

Of Counsel,
WALKER, BORDELON,
HAMLIN & THERIOT

David E. Walker
Counsel for Petitioner
New Orleans Steamship
Association
701 South Peters Street
New Orleans, Louisiana 70130
(504) 524-5328

Of Counsel,
LAMBOS, FLYNN,
NYLAND & GIARDINO

C. Peter Lambos
Counsel for Petitioner
New York Shipping
Association, Inc.
29 Broadway, 9th Floor
New York, New York 10006
(212) 943-2470

Of Counsel,
FREEHILL, HOGAN
& MAHAR

Nathan J. Bayer
Counsel for Petitioner
South Atlantic Employers
Negotiating Committee
80 Pine Street
New York, New York 10005
(212) 425-1900

Of Counsel,
Sam P. Inglesby, Jr.
ADAMS, GARDNER, ELLIS & INGLESBY, P.C.
Counsel for Petitioner
South Atlantic Employers Negotiating Committee
P.O. Box 2364
Savannah, Georgia 31498
(912) 233-1108

APPENDIX

APPENDIX A

Second Circuit Opinion

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

[FILED—APR 15 1985—Elaine B. Goldsmith, Clerk]

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 15th day of April one thousand nine hundred and eighty-five.

Present: HONORABLE THOMAS J. MESKILL,
HONORABLE GEORGE C. PRATT,
Circuit Judges.
HONORABLE EDMUND L. PALMIERI,*
District Judge.

Docket No. 84-7828

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,
Petitioner-Appellant, Cross-Appellee,

v.

WEST GULF MARITIME ASSOCIATION,
Respondent-Appellee, Cross-Appellant,

COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS,
Intervenor.

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* Honorable Edmund L. Palmieri, United States District Judge for the Southern District of New York, sitting by designation.

Docket Nos. 85-7136, 85-7150, 85-7152, 85-7158, 85-7160, 85-7162, 85-7170

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,
Petitioner-Appellee,

v.

WEST GULF MARITIME ASSOCIATION, COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS, NEW YORK SHIPPING ASSOCIATION, INC., NEW ORLEANS STEAMSHIP ASSOCIATION, SOUTHEAST FLORIDA EMPLOYERS PORT ASSOCIATION, INC., SOUTH ATLANTIC EMPLOYERS NEGOTIATING COMMITTEE and MOBILE STEAMSHIP ASSOCIATION, INC.,
Respondents-Appellants.

This appeal consolidates two actions. Action #1 (No. 84-7828) is an appeal from an order entered in the United States District Court for the Southern District of New York, Sand, *J.*, denying ILA's motion to confirm and enforce an arbitration award rendered on June 12, 1984 by the ILA-Management Emergency Hearing Panel (EHP). The motion was denied without prejudice to renewal following remand to the EHP for clarification as the finality of its award.

Action #2 (Nos. 85-7136, 85-7150, 85-7152, 85-7158, 85-7160, 85-7162, 85-7170), which includes a number of respondents not named in Action #1, is an appeal from the subsequent order entered in the United States District Court for the Southern District of New York by Judge Sand granting ILA's motion to confirm the June 12 award and denying respondents' motions to dismiss for lack of personal jurisdiction and failure to state a claim on which relief can be granted.

Action #1 is DISMISSED as nonappealable.

The order of the district court in Action #2 is AFFIRMED.

Action #1 is the appeal of West Gulf Maritime Association (WGMA) of the district court's denial of WGMA's motion to dismiss or to transfer the action to Texas and of the court's failure to vacate the arbitration award. Despite the language used in the August 30, 1984 judgment order characterizing the disposition of the motion as a denial, we do not believe that

that was a final decision within the meaning of 28 U.S.C. § 1291. Therefore, we do not have jurisdiction to entertain WGMA's arguments in Action #1.

Action #2 presents three arguments. Respondents argue that the court erred in confirming the EHP award against employer associations that were not parties to the local grievance which initiated the dispute and in exercising jurisdiction over the nonresident employer associations. They also argue that it was error to confirm the award because the panel's decision was not an interpretation of the Master Contract but rather constituted an alteration of the terms and conditions of local collective bargaining agreements and, as such, was outside the scope of the EHP's authority. Finally, respondents argue that the court erred in refusing to review the substantive and procedural irregularities inherent in the award.

New York's long arm jurisdiction statute provides for the assertion of personal jurisdiction over any party who in person or through an agent "transacts any business within the state." N.Y. Civ. Prac. Law § 302(a)(1) (McKinney 1972). A single transaction will satisfy this requirement if the cause of action arises out of the transaction. *George Reiner & Co.* v. *Schwartz*, 41 N.Y.2d 648, 650-53, 394 N.Y.S.2d 844, 846-47 (1977). The respondent employer associations agreed to meet through their EHP representatives in New York for the June 12, 1984 meeting. "[T]he agreement to resolve disputes by arbitration in New York constituted consent to personal jurisdiction in New York." *Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Lecopulos*, 553 F.2d 842, 844 (2d Cir. 1977). Moreover, the award purported to be a decision based on the Master Contract. All of the respondents are parties to the Master Contract. Thus, the EHP decision, if valid, would be binding against all of the respondents. The district court did not err in confirming the award against them. The decision of the EHP is binding on all ports governed by the Master Contract.

Respondents' second argument is premised on their interpretation of Master Contract language and on their opinion as to the proper resolution of a conflict between a local contract provision and a Master Contract provision. We have recently held that "if an arbitrator offers even a barely colorable

justification for [his] decision, we will not vacate it on the basis of a claim he exceeded his authority by misinterpreting the parties' contract." *United States Steel & Carnegie Pension Fund* v. *Dickinson*, 753 F.2d 250, 252 (2d Cir. 1985). It is evident from the language of the resolution by the EHP that the panel clearly decided an issue of interpretation under the Master Contract. Accordingly, we reject respondents' second argument.

Respondents' final argument fails as well. Once a court determines that the parties have agreed to arbitrate disputes and that the dispute at issue is within the class which the parties have agreed to arbitrate, its inquiry, generally, must end. " '[P]rocedural' questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator." *John Wiley & Sons* v. *Livingston*, 376 U.S. 543, 577 (1964). Respondents have not shown that the EHP's outcome on procedural questions was without colorable justification. Therefore, we will not set aside the award on procedural grounds. By agreeing to submit their disputes to arbitration, "each party also accepts the risk that the arbitrator's interpretation of the contract will disagree with its own and may, in fact, be wrong." *Advance Publications* v. *Newspaper Guild of New York, Local 3*, 616 F.2d 614, 618 (2d Cir. 1980). Taken together, respondents' arguments all appear to be calculated to encourage us to reexamine the merits of the question that was before the EHP. We decline that invitation.

/s/ THOMAS J. MESKILL
Thomas J. Meskill, U.S.C.J.

/s/ GEORGE C. PRATT
George C. Pratt, U.S.C.J.

/s/ EDMUND L. PALMIERI
Edmund L. Palmieri, U.S.D.J.

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

APPENDIX B

Decision of Southern District, February 19, 1985 (Judge Sand)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

84 CIV 9080 (LBS)

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,
Petitioner,

—against—

WEST GULF MARITIME ASSOCIATION, COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS, NEW YORK SHIPPING ASSOCIATION, INC., NEW ORLEANS STEAMSHIP ASSOCIATION, SOUTHEAST FLORIDA EMPLOYERS PORT ASSOCIATION, INC., SOUTH ATLANTIC EMPLOYERS NEGOTIATING COMMITTEE, MOBILE STEAMSHIP ASSOCIATION, INC.,
Respondents.

OPINION—February 19, 1985

APPEARANCES:

THOMAS W. GLEASON, ESQ.
Attorney for Petitioner,
International Longshoremen's Association
90 Broad Street
New York, N.Y. 10004
ERNEST L. MATHEWS, JR., ESQ.

HEALY & BAILLIE
Attorneys for Respondent,
West Gulf Maritime Association
29 Broadway
New York, N.Y. 10006
HOWARD M. MCCORMACK, ESQ.
Of Counsel

CLIFTON, BUDD, BURKE & DEMARIA
Attorneys for Respondent
Council of North Atlantic Shipping Associations
420 Lexington Avenue
New York, N.Y. 10170
THOMAS W. BUDD, ESQ.
ROBERT A. WIESEN, ESQ.

FRANCIS A. SCANLAN, ESQ.
Attorney for Respondent and
Cross-Petitioner CONASA
2900 Two Mellon Bank Center
Philadelphia, PA 19102

LAMBOS, FLYNN, NYLAND & GIARDINO
Attorneys for Respondent,
New York Shipping Association, Inc.
29 Broadway
New York, N.Y. 10006
PETER LAMBOS, SR., ESQ.
Of Counsel

WALKER, BORDELON, HAMLIN & THERIOT
Attorneys for Respondent
New Orleans Steamship Association
500 Natchez Street
New Orleans, LA 70130
DAVID WALKER, ESQ.

New York Counsel:
BREED ABBOTT & MORGAN
153 East 53rd Street
New York, N.Y. 10022
DAVID SPELLMAN, ESQ.

HOGG, ALLEN, RYCE, NORTON & BLUE
Attorneys for Respondent
Southeast Florida Employers Port Ass'n, Inc.
121 Majorka Avenue
Coral Gables, Florida 33134
DONALD T. RYCE, JR., ESQ.

New York Counsel:
FREEHILL, HOGAN & MAHAR
80 Pine Street
New York, N.Y. 10005
NATHAN J. BYER, ESQ.

ADAMS, GARDNER, ELLIS & ENGLES
Attorneys for Respondent
South Atlantic Employers Negotiating Committee
P. O. Box 2364
Savannah, Georgia 31498
SAM INGLESY, ESQ.

New York Counsel:
FREEHILL HOGAN & MAHAR
NATHAN J. BAYER, ESQ.

HAIGHT, GARDNER, POOR & HAVENS
Attorneys for Respondent
Mobile Steamship Association, Inc.
1 State Street Plaza
New York, N.Y. 10004
JOHN WEIR, ESQ.

SAND, J.

Before this Court is the International Longshoremen's Association, AFL-CIO ("ILA") Petition to Confirm and Enforce an Arbitration Award and cross-motions to vacate that award[1] and to dismiss for lack of personal jurisdiction and failure to state a claim upon which relief can be granted.[2] This is a

1 Respondents West Gulf Maritime Association ("WGMA") and Council of North Atlantic Shipping Associations ("CONASA") so move.

2 Respondents Southeast Florida Employers Port Association, Inc. ("SFEPA"), New Orleans Steamship Association ("NOSA"), South Atlantic Employers Negotiating Committee ("SAENC"), and Mobile Steamship Association ("MSA"), so move. We refer to these movants collectively as the "Other Regional Employer Associations."

subsequent stage in the proceedings which gave rise to this Court's Opinion and order of October 4, 1984, *International Longshoremen's Association* v. *West Gulf Maritime Association*, 594 F.Supp. 670 (S.D.N.Y 1984), familiarity with which is assumed, and the background issues of this controversy will not be repeated herein.[3]

In our October 4th Opinion, we held that the question *whether* an arbitration award has been made should be determined by the arbitrators themselves, not the Court, and we accordingly remanded the matter to the Emergency Hearing Panel ("EHP") for resolution of that question. The EHP then met to consider the effect that the abstention by a management representative had had on the vote taken at its June 12, 1984 meeting on the ILA resolution on container gang sizes. The EHP was unable to agree on the consequences of the June 12th abstention and, pursuant to deadlock procedures prescribed by the EHP by-laws, referred the matter to arbitration by a third-party arbitrator selected jointly by management and labor. The arbitrator, Arnold M. Zack, Esq., issued his award on December 10, 1984 (Ex. 4 to Petition to Confirm) finding that the ILA resolution received a majority of votes and that it therefore resulted in a final, binding and enforceable award under the relevant agreements of the parties.

The first issue to be addressed is the contention of WGMA and CONASA that the issue before Mr. Zack was not arbitrable or, if arbitrable, that his decision was "in manifest disre-

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3 The West Gulf Maritime Association ("WGMA") has appealed this Court's prior order to the Court of Appeals for the Second Circuit and initially moved in the District Court to stay proceedings pending a determination of that appeal. At oral argument on January 31, 1985, however, it appeared that the application was withdrawn with the understanding and agreement that the parties would join in a request to the Court of Appeals to consolidate the appeal from this Court's decision on these motions with the pending appeal, request an expeditious processing of that appeal and refrain from instituting any new legal proceedings or job actions predicated on this ruling pending appellate review by the Court of Appeals. *See* transcript proceedings January 31, 1985. However, correspondence received subsequent to oral argument indicates that it is the position of several shipping associations that no such stipulation exists. The application for a stay is denied.

gard of the undisputed facts and law and is an abuse of the arbitration process." Affidavit of Walter A. Niemand in Opposition to Motion of Confirm, par. 10. This contention is without merit.

There is no need to restate the proposition, well understood by the parties, that the scope of judicial review of arbitration awards is severely limited. *See* cases cited in *International Longshoremen's Association* v. *West Gulf Maritime Association*, 594 F.Supp. at 675. These principles were reaffirmed last month by the Court of Appeals for the Second Circuit in *United States Steel and Carnegie Pension Fund* v. *Dickinson*, slip op. 84-7621 (2d Cir. Jan. 23, 1985). There the court wrote:

> We believe our decision in *Advance Publications, Inc.* v. *Newspaper Guild*, 616 F.2d 614 (2d Cir. 1980), governs this case. There we held that if an arbitrator offers even a barely colorable justification for his decision, we will not vacate it on the basis of a claim he exceeded his authority by misinterpreting the parties' contract. That holding reflects our recognition that arbitrators must have broad authority to interpret the contracts they apply. *Id.* at 617. It also reflects the narrow reading we have consistently accorded our authorization, under the Federal Arbitration Act, to vacate arbitration awards on the ground that the arbitrator has overstepped his power. *Andros Compania Maritima, S.A.* v. *Marc Rich & Co.*, 579 F.2d 691, 703 (2d Cir. 1978).

Slip op. at 1486.

Here, the arbitrator, in a well-reasoned opinion, resolved precisely the specific issue referred to him. The concept advanced by respondents that only "substantive" and not "procedural" matters were subject to the EHP's deadlock procedures is baseless and would frustrate the obvious intent of the EHP by-laws to avoid any impasses.

The question *whether* the EHP issued a final and binding award on June 12th thus has been answered in favor of the Petitioner. Accordingly, we proceed to the issues left undecided in our October 4th Opinion.

The Claims of WGMA and CONASA

WGMA and CONASA contend that the EHP award should be vacated pursuant to 9 U.S.C. § 10(d) which authorizes a court to vacate an award "where the arbitrators exceeded their powers or so imperfectly executed them that a mutual final and definite award upon the subject matter was not made." At the heart of respondents' claim is the contention that the ILA resolution before the EHP on June 12, 1984 addressed a matter appropriately dealt with at the local level and not one arising under the Master Contract. That, however, was the very issue raised by the June 12th resolution and decided adversely to respondents. In passing the resolution, the EHP rejected the argument of management that the Master Contract did not govern the minimum size of container gangs using more than two drivers.

The EHP unquestionably has the authority to determine whether an issue is covered by the containerization provisions of the Master Contract. Such authority is a necessary part of its general authority, expressly granted by the parties, to resolve disputes relating to the containerization provisions.

What respondents, in essence, now argue is that the EHP's conclusion was wrong. But that argument, even if accepted, is not a basis for vacating the award. As the Second Circuit noted in *Advanced Publications*, the parties "have agreed to accept the judgment of an arbitrator, not that of a judge. By doing so, each party also accepts the risk that the arbitrator's interpretation of the contract will disagree with its own and may, in fact, be wrong." *Advance Publications*, *supra*, 616 F.2d at 618. Unless the construction adopted by the arbitrator was irrational, it will not be overturned by the courts. *United States Steel and Carnegie Pension Fund, supra*. Respondents have offered no argument to support a conclusion that the construction of the Master Contract adopted by the EHP was irrational.[4]

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4 WGMA and CONASA also contend that the award (which relates generally to drivers) did not address the specific grievance that was before the EHP (which related to Port-O-Packer operators) and that the matter was not

WGMA and CONASA also challenges the award on grounds of inadequate notice and failure to consider or allow presentation of pertinent evidence. These objections are somewhat more troubling. As noted in our October 4th Opinion, the issue decided on June 12th was one of considerable significance to the shipping industry, and the manner in which it was raised and decided was far from a model of orderly deliberation. Nonetheless, mindful of the strict limitations imposed upon judicial review of arbitration awards, we do not believe that these objections provide a basis for vacating the June 12th award.

Resolution of the procedural matters arising out of arbitration are generally left to the arbitrator. *See John Wiley & Sons* v. *Livingston*, 376 U.S. 543 (1964). Here, the procedural objections that are now raised to the award were raised as well at the June 12th meeting and rejected by the EHP when the resolution was put to a vote.

An arbitrator's ruling on procedural issues will not be overturned under 9 U.S.C. § 10(c) unless it had the effect of denying the parties a fundamentally fair hearing, or was otherwise an unreasonable decision that prejudiced the rights of a party. *See Bell Aerospace Co.* v. *Local 516*, 500 F.2d 921 (1974); *Dan River, Inc.* v. *Cal-Togs, Inc.*, 451 F.Supp. 497 (S.D.N.Y. 1978).

Here, the procedures expressly agreed to by the parties give the EHP considerable flexibility with respect to notice and presentation of evidence. An EHP meeting can be convened on "short notice by telephone" although five days' notice is preferred. EHP Rules of Procedure, para. B. Notice must be given to a party against whom a grievance has been filed, but no amount is specified. *Id.*, para F. With respect to presenta-

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properly before the EHP because local grievance procedures had not been exhausted. These questions, too, are matters of contract interpretation that were likewise argued before, and resolved by, the EHP at its June 12th meeting. Absent a showing that the constructions adopted by the EHP were irrational (and none has been offered), they will not be overturned by this Court.

tion of evidence, a party against whom a grievance has been filed must be given an opportunity to present "such evidence as may be reasonably necessary to support his position," but the EHP may determine "whether to take testimony or to accept proof in any reasonable form acceptable to the panel." *Id.*

Four days' notice was given of the grievance against WGMA.[5] No formal testimony or presentation of documentary evidence took place, but the ILA resolution was discussed at length by the members of the EHP, who were representatives of the parties affected, and who were clearly conversant with the issue of contractual interpretation raised by the resolution.

Given the importance of the issue, it might have been preferable to defer a vote on the ILA resolution until labor and management representatives had had an opportunity to consult at length among one another and with their membership, or until representatives of each side had made a formal presentation of their respective positions on the issue. However, we do not find that a failure to defer the vote was, under the circumstances, so unreasonable or fundamentally unfair to the parties as to justify judicial nullification of the vote.[6]

The Claims of the Other Regional Employer Associations

The ILA has joined in this proceeding Other Regional Employer Associations (see fn. 2, *supra*) who were not parties to the prior proceeding before this Court and various objections are raised on their behalf relating to the basis for personal jurisdiction, adequacy of notice and the propriety of

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5 In addition to arguing that this notice was inadequate, WGMA contends alternatively that it had *no* prior notice of the ILA resolution since the grievance placed on the agenda related to a local dispute about Port-O-Packer operators, not a Master Contract issue about utilization of drivers generally. We reject this alternative contention as an indirect attempt to reargue the merits of the EHP's resolution.

6 A final ojbection that WGMA and CONASA raise to the award is that it was the product of duress or coercion. We find this contention to be meritless.

joining them as parties at this time. None of the objections is persuasive.

These associations first contend that they are not subject to this Court's jurisdiction because they do not transact business here. However, they are signatories to the Master Contract, which entrusts to the EHP resolution of issues involving the containerization provisions of the Master Contract. Accordingly, as signatories to the Master Contract, they have consented to the jurisdiction of the EHP—and consequently to the jurisdiction of this Court to confirm its awards. *Merrill Lynch, Pierce, Fenner & Smith* v. *Lecopulos*, 553 F.2d 842 (2d Cir. 1977).[7]

The associations next contend that the petition should be dismissed as against them for failure to state a claim upon which relief can be granted. The basis of this contention is that WGMA was the only shipping association which was a party to the grievance that resulted in the abritration award.

The situation is an unusual one. WGMA was, indeed, the only party named in the grievance. The grievance in question, however, was whether a particular practice was governed by the containerization provisions of the Master Contract. Since all signatories to the contract are bound by its terms, and since

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7 SAENC disputes that it participated in the EHP proceedings in any fashion other than the appearance of its representatives as arbitrators, not as parties to a grievance. It claims that since these representatives were serving in the capacity of arbitrators at the June 12, 1984 hearing, it is immune from suits at law under *Calzarano* v. *Liebowitz*, 550 F.Supp. 1389 (S.D.N.Y. 1982).

Given our conclusion that the parties consented to the jurisdiction of the EHP, their presence in New York at the June 12th meeting is not a prerequisite to this Court's jurisdiction over them in an action to enforce an award made by the EHP. Nonetheless, it is clear that the parties came to New York not solely in their capacity as arbitrators, but also in their capacity as management representatives. As a result, they are subject to this Court's jurisdiction, both on the ground of consent, and on the ground that they transacted business in New York out of which this litigation arises. N.Y.C.P.L.R. § 302(a)(1).

Calzarano related to the personal liability of an arbitrator acting in a quasi-judicial capacity and does not relate to the consequences of agreeing to and participating in an arbitration.

r olution of disputes relating to those terms have been entrusted to the EHP, the EHP's vote on the June 12th resolution necessarily affected all signatories to the Master Contract and not simply the party against whom the original grievance was filed.[8] In addition, the award simply requires future adherence to the terms of the Master Contract as interpreted by the EHP on June 12th. It does not, in other words, require any retroactive or remedial measures that might not be equally applicable to all signatory associations.

Under the unusual circumstances of this case, we believe that the Other Regional Employer Associations are parties to the arbitration award within the meaning of the Arbitration Act. Even if they are not, however, we believe that § 301 of the Labor-Management Relations Act, 29 U.S.C. § 185, provides a cause of action for enforcement of the award against the associations on the basis of their contractual obligation to abide by the terms of the Master Contract as interpreted by the EHP.[9]

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8 Nor is there any doubt that the EHP (whose members include representatives of all the Other Regional Employer Associations) understood the award to be binding on all signatories to the Master Contract. The announcement of the award, signed by representatives of management and labor, is addressed "To All Carriers, Direct Employers, Port Associations and ILA Locals," and states that "[i]t is required that this determination be lived up to its fullest intent by all parties." Ex. 3 to Petition to Confirm.

9 In a motion filed after oral argument and the full submission of the petition to confirm and cross-motions, SAENC requests an evidentiary hearing with respect to the purposes for which the June 12th EHP meeting was called and whether job assignments within the container gang was a proper subject for consideration by EHP. The ILA opposes the request and seeks an award of costs incurred in connection with its opposition.

Both applications are denied. No disputed facts need be resolved by this Court. The contentions were presented to and rejected by the EHP which was the appropriate fact-finding body. The Other Regional Employer Associations seek the opportunity to relitigate in this Court or in their local district courts the precise issues determined by the EHP. This would of course essentially defeat the purpose and intent of having a Master Contract and the concepts of conformity and expeditious dispute resolution embodied in that Master Contract and in the establishment of the EHP.

Finally, the Other Regional Employer Associations raise objections as to lack of adequate notice and failure to exhaust local grievance procedures. These objections fail, however, for the same reason that those raised by WGMA and CONASA were rejected.[10]

Accordingly, for the reasons stated, the motion to confirm the Petition is granted and the motions to vacate and dismiss are denied.

SO ORDERED.

Dated: New York, New York
February 19, 1985

LEONARD B. SAND
U.S.D.J.

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10 A defect in service of process was also raised by SFEPA, and conceded by the petitioner at oral argument, but has since been cured by proper service of process.

APPENDIX C

Decision of Southern District, October 4, 1984 (Judge Sand)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

84 CIV 4594 (LBS)

[STAMP—FILED OCT 4 1984]

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,
Petitioner,

—against—

WEST GULF MARITIME ASSOCIATION,
Respondent,

COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS,
Intervenor.

OPINION—October 4, 1984

APPEARANCES:

THOMAS W. GLEASON, ESQ.
Attorney for Petitioner
90 Broad Street
New York, New York
ERNEST L. MATHEWS, JR., ESQ.
Of Counsel

HEALY & BAILLIE, ESQS.
Attorneys for Respondent
29 Broadway
New York, New York
HOWARD M. MCCORMACK, ESQ.
GEORGE M. LEING, ESQ.
Of Counsel

CLIFTON, BUDD, BURKE & DEMARIA, ESQS.
Attorneys for Intervenor
420 Lexington Avenue
New York, New York
KEVIN J. MCGILL, ESQ.
CARLYLE M. DUNAWAY, JR., ESQ.
Of Counsel

SAND, J.*

The International Longshoremen's Association (hereinafter the "ILA") has petitioned this Court to confirm and enforce an arbitration award made by the ILA-Management Emergency Hearing Panel (hereinafter the "Emergency Hearing Panel," the "EHP," or "the Panel") at its June 12, 1984 meeting in New York City.[1] Respondent West Gulf Maritime Association (hereinafter "WGMA") seeks, in turn, to have the award vacated. The Council of North Atlantic Shipping Associations (hereinafter "CONASA") has intervened on behalf of Respondent. The action is based on § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, and the United States Arbitration Act, 9 U.S.C. §§ 9 and 10. For the reasons discussed below, we remand the matter to the Emergency Hearing Panel for further proceedings not inconsistent with this Opinion.

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* This opinion is a stylistically revised version of an Opinion delivered orally on August 29, 1984.

1 Since the Emergency Hearing Panel is a joint labor-management committee, its decisions are not, strictly speaking, arbitration awards. However, they are entitled to enforcement or subject to being vacated in the same manner as arbitration awards. *See, e.g., General Drivers, Warehousemen & Helpers, et al.* v. *Riss & Co., Inc.*, 372 U.S. 517, 519 (1963).

For purposes of simplicity and convenience, the Panel's decision will be referred to as an arbitration award in this Opinion.

Background

Petitioner ILA, Respondent WGMA, and Intervenor CONASA are signatories to a series of collective bargaining agreements between the ILA and a coalition of seven multi-employer shipping associations. These agreements, which pertain to longshore operations in 36 ports ranging from New England to Texas, are known collectively as the Master Contract. Among the provisions of the Master Contract is one that establishes the Emergency Hearing Panel—a panel comprising representatives of the ILA and the signatory shipping associations whose function is to resolve disputes relating to the containerization provisions of the Master Contract.

At a meeting held on June 12, 1984, in New York City, the Panel heard a grievance brought by Local 20 of the ILA against WGMA. According to the minutes of the meeting, the following events transpired.[2] The grievance alleged that WGMA's practice of requiring members of the ILA's 20-man containerization gang to function as Port-O-Packer operators, rather than hiring additional men to operate the machines, violated the Master Contract's requirement that the minimum size of a container gang be 18 men plus two drivers." After some discussion, a motion was made by an ILA representative "that the gang size shall be 18 plus two with drivers added to the twenty." A vote was then taken. *See* Minutes of June 12, 1984 meeting, Exhibit B to the Affidavit of William J. Detweiler, at Item 6.

Nine ILA representatives were present at the meeting, and all nine voted in favor of the motion. Nine management representatives, including an alternate, were present and eight of those representatives (including the alternate) voted against the motion. The vote of the ninth representative, James Costello, is recorded in the minutes as an asterisk with the

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2 As will be discussed below, the accuracy of these minutes has been challenged at various times by representatives of both management and labor. The use of the minutes here is intended only to provide a general introduction to a complicated labor dispute and does not constitute a finding that they are an accurate reflection of what in fact transpired at the meeting.

explanation that: "When polled, Mr. Costello stated that he would abstain from voting. However, he subsequently stated that he would stand by the Master Contract. This was considered to be a vote in favor of the Motion." In addition, the minutes indicate that although the alternate voted 'no,' "it was subsequently determined that alternates were not entitled to cast a vote." *Id.*

The minutes then reflect that amid a discussion following the vote, Co-Chairman Dickman stated that a "motion has been made and carried." The minutes end by recording the following resolution together with a request by Co-Chairman Gleason that it be circulated to all carriers, Port Associations, and ILA locals:

"RESOLVED: That in accordance with the provisions of the Master Collective Bargaining Agreement, negotiated by and agreed to by the parties, the minimum size of a container gang shall be 18 men plus two drivers and that should additional drivers be required, such drivers are to be drawn from outside the gang and shall not be part of the regular 20-man gang." *Id.*

Two days later, notice of the resolution was issued in a memorandum signed by Co-Chairmen Dickman and Gleason. *See* Exhibit 3 to Petitioner's Notice of Petition. In the weeks that followed, letters of protest were sent to Co-Chairman Dickman by representatives of various shipping associations. *See* Exhibit D to the Affidavit of William J. Detweiler.

On July 16, 1984, the ILA applied to this Court for an order confirming and enforcing the June 12th award. WGMA filed a cross-motion to dismiss the petition for lack of in personam jurisdiction or, alternatively, to have the action transferred to the United States District Court for the District of Texas. Oral argument was heard on the motions on August 9, 1984, and Respondent's cross-petition to dismiss or transfer the action was denied. The parties were instructed to brief the merits of the petition, and to return for additional oral argument of August 23, 1984. On August 14, 1984, the parties consented to the intervention of CONASA, one of the other signatories to the Master Contract, on behalf of Respondent WGMA.

On August 16, 1984, the Emergency Hearing Panel met again in New York City. At that meeting, James Costello reported that the minutes of the June 12th meeting did not accurately reflect his vote, and he asked that the minutes be corrected to reflect that he had abstained. *See* Minutes of the August 16, 1984 meeting of the EHP, Exhibit 12 to the Second Affidavit of Walter A. Niemand at p. 3.

Mr. Costello's description of the June 12th vote is recorded in the August 16th minutes as follows:

> "When the vote was first called, and after Mr. Remsen Whitehouse clearly stated no, I clearly stated that I stand by the language of the master contract, which is 18 men plus 2 drivers. After much conversation, Mr. Bowers was asked to reiterate his motion, at which time, I subsequently abstained."

Id. The minutes of August 16th meeting then reflect that a motion was made and carried to correct the June 12th minutes to reflect an abstention on the part of Mr. Costello. No indication was given as to what effect, if any, this correction had on the result of the June 12th vote.

The August 16th meeting of the Emergency Hearing Panel was not attended by any representatives of the ILA. According to the minutes of that meeting, a written statement had been received from the ILA with a request that it be read into the record. The statement was recorded as follows:

> "Since the authority of Panel has been raised by the West Gulf that there is *no* Panel, we should table all matters pending a decision of the Federal Court in New York. We would oppose any reconsideration or any amendment of the minutes."

Id. The August 16th meeting was adjourned without further action or discussion with respect to the June 12th meeting.

Discussion

Respondent has raised a number of objections to confirmation of the award issued by the Panel at its June 12th meeting.

At present, we need reach only two. The first objection is that the authority of the EHP to resolve disputes between the ILA and the signatory shipping associations ended on May 9, 1984. The second is that, even if the Panel retained the authority to make awards, the June 12th vote constituted a deadlock under EHP rules and thus no award in fact was made.[3] As to the issue of the existence and authority of the EHP, we resolve the question whether the EHP has in fact rendered a final award under the unusual voting procedures that the parties apparently have adopted, we remand that question to the EHP for its interpretation and determination in the first instance of its own rules.

1. *The Authority of the Emergency Hearing Panel to Resolve Disputes after May 9, 1984*

Respondent first argues that the EHP was created as a response to an injunction entered against the Rules on Containers, and that when the rules were upheld by the Fourth Circuit on May 9, 1984, "the raison d'etre of the EHP ceased to exist," Respondent's brief at 11, and with it, the authority of the EHP to function as a dispute-resolving mechanism.

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3 In addition, Respondent has argued that the notice given to management of the grievance was insufficient; that local grievance procedures had not been exhausted as required by EHP rules; that the grievance itself, in any event, was not a Master Contract issue and thus not properly before the EHP; that the award made by the EHP did not relate to the specific grievance before it; that the Panel failed to consider or allow presentation of pertinent evidence; and that the award was the product of coercion and duress.

It may be noted that in a recent opinion granting a preliminary injunction to enforce an arbitration agreement between the ILA and the Hampton Roads Shipping Association, the District Court for the Eastern District of Virginia resolved in favor of management the issue of whether the grievance in question was purely local or a master contract concern. *See Hampton Roads Shipping Association* v. *ILA*, 84 Civ. 500 N, slip op. (E.D.Va. August 24, 1984). The Fourth Circuit has since stayed the preliminary injunction.

For the reasons discussed below, we do not reach that question nor the further issues implicated by it—namely, whether the characterization of a grievance as a Master Contract concern is one to be made by the EHP, and whether that characterization is one properly subject to judicial review.

This argument is not persuasive. It is true that the Tampa Agreement, which created the Emergency Hearing Panel, suggests that the Panel was intended to be a temporary measure that would see the ports through the uncertainty created by the injunction issued against the Rules on Containers. However, paragraph 3 of the Amendatory Containerization Agreement of July 29, 1983 provides that:

> The Management-ILA Emergency Hearing Panel shall also act as the Management-ILA Container Committee and all provisions of the June 19, 1984 Agreement dealing with the implementation and enforcement of the Containerization Agreement shall apply to implementation and enforcement of the Rules on Containers.

See Petitioner's Exhibit A-10. Thus, it would appear that whatever their original intent may have been in creating the EHP, the parties subsequently decided that the Panel would continue to resolve disputes even after the injunction against the Rules on Containers had been lifted.

In any event, WGMA and the other shipping associations voluntarily participated in the operation of the Panel after May 9, 1984 and specifically in the vote taken by the Panel on June 12. One who voluntarily participates in arbitration will not thereafter be heard to complain that the arbitrator was without authority to act. *See, e.g., Teamsters Local Union No. 533* v. *Herbert Fuel Oil & Trucking Co.*, 543 F.Supp. 831 (E.D.N.Y. 1982). The actions of the parties leave no room for doubt that the Emergency Hearing Panel was, as of June 12, authorized to resolve disputes between members of the ILA and the signatory shipping associations.

2. *Whether an Award in fact was made on June 12, 1984.*

Respondent's second objection to judicial confirmation of the June 12th award is that under the rules and procedures of the EHP, a majority vote of the Panel is required in order for an award to issue and that a majority vote was not in fact obtained on June 12. This objection focuses on the effect that an abstention has on the voting totals.

Under the procedures of the Emergency Hearing Panel, at least as described to this Court by the parties, labor and management are each entitled to cast eleven votes at a panel meeting *regardless of the number of panel members actually present at the meeting*.[4] Consequently, every vote will result in a deadlock unless a panel member in some fashion "breaks ranks."

It is undisputed that this is accomplished if a panel member affirmatively casts his vote for the other side—that is, if a labor representative casts his vote affirmatively in favor of the management position or vice versa. Petitioner contends that it is also accomplished if a panel member abstains. Respondent counters that an abstention is equivalent to an absence, at that the deadlock on June 12th thus remained unbroken.

The written rules of the Emergency Hearing Panel are silent on the effect on the abstention.[5] Recourse to evidence of past

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4 This is not entirely clear from the formal rules of the EHP. Such a procedure is indeed prescribed for meetings of the Executive Committee of the EHP. *See* Amendatory Containerization Agreement, Petitioner's Exhibit A-10 at paragraph 4. However, the rules governing regular panel meetings, such as the one held on June 12th, specify only that as a general matter each side shall have an equal vote. *See infra* fn.5. That provision may be interpreted as prescribing an equal number of votes *regardless* of the number of panel members actually present, but it need not be read in this fashion. The minutes of the June 12th meeting reflect some confusion on this point, as do several of the affidavits which have been submitted to this Court. At oral argument, both parties represented that the practice of the EHP was to give each side 11 votes regardless of the number of panel members actually present. Whether this representation is accurate is another point that can be considered and clarified by the EHP on remand.

5 There are relatively few formal rules governing the operation, and, in particular, the voting procedures of the Emergency Hearing Panel. The agreement that created the Panel specifies only that it comprise "an equal number of representatives from each side." Tampa Agreement, Petitioner's Exhibit A-6, Paragraph IV. A subsequent provision, contained in an agreement executed in Hollywood, Florida, on June 19, 1981, briefly outlines the procedures to be followed by the Panel. With respect to voting procedures, the Hollywood Agreement provides that:

> Management and labor shall each designate eleven representatives to sit on the Panel; a quorum consists of a majority of each side of the

practice, insofar as it has been disclosed to this Court, is likewise unavailing since the issue appears never to have arisen. Indeed, at oral argument on this application, it was stated that the June 12th meeting was the first occasion in the history of EHP when a formal vote was even taken.

As a result, three alternatives are available to this Court: to decide what the effect of an abstention *should be* under EHP procedures; to hold that the EHP itself made that determination at the June 12th meeting; or to remand the matter to the EHP for clarification of its voting procedures. We believe that the third alternative is the only appropriate one in this case.

It is a commonplace that judicial review of arbitration awards is severely limited. *See, e.g., Local 1078* v. *Anaconda American Brass Co.*, 256 F.Supp. 686 (D.Conn. 1966). A court

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> panel; each side shall have an equal number of votes; each side shall have the right to designate alternates; a decision of the Panel is rendered by a majority vote thereof and constitutes a final and binding enforceable award; and in the event of a deadlock, the president of the ILA and the president of the New York Shipping Association shall within two days select a third party to break the deadlock.

Petitioner's Exhibit A-8 at Paragraph 6-C.

A month after the Hollywood Agreement was signed, the Emergency Hearing Panel issued its own "Rules of Procedure," which incorporate and elaborate somewhat on the provisions contained in the Hollywood Agreement. The voting procedures are described as follows:

> Determination of the Panel shall be rendered by a majority of the Panel, provided that a quorum, of at least one side, is present at the time of voting. Votes must be cast in person, and no proxies may be used except that alternates may vote in the absence of the person whom they represent. If either the Management or the ILA members, or any of them, fail to appear, after notice, the other side may continue the meeting and issue an award which shall have the same effect as if both sides were represented at the meeting.

Exhibit 5 to the affidavit of Walter A. Niemand, at Paragraph G.

Finally, the Amendatory Containerization Agreement of July 29, 1983 added a procedure for the quick resolution of certain disputes by a meeting of the Executive Committee of the Emergency Hearing Panel. At such a meeting, a determination is rendered by a "majority vote of the Executive Committee, each side having an equal number of votes without regard to the number of persons present." Petitioner's Exhibit A-10, at Paragraph 4. These several rules apparently constitute the whole of the formal guidance available as to the voting procedures of the Emergency Hearing Panel.

cannot reexamine the substance of an arbitrator's decision. *See, e.g., Glasser* v. *American Federation of Musicians of United States and Canada*, 354 F.Supp. (1 S.D.N.Y.), *aff'd*, 487 F.2d 1393 (2d Cir. 1973). Nor will it readily intervene in the procedural disputes that arise during arbitration. *See, e.g., Wiley & Sons, Inc.* v. *Livingston*, 376 U.S. 543, 555-59 (1964). The role of the courts generally is limited to determining whether one of the specific statutory grounds for vacating an award is present in a given case. *See, e.g., Saxis Steamship Co.* v. *Multifacs International Traders, Inc.*, 375 F.2d 577 (2d Cir. 1967). The principle underlying this policy of restraint is that arbitration should be an alternative to litigation, not a source of it, and that it is an alternative that should be encouraged. *See, e.g., Wilko* v. *Swan*, 346 U.S. 427, 431-32 (1953); *Amicizia Societa Navegazione* v. *Chilean Nitrate and Iodine Sales Corp.*, 274 F.2d 805, 808 (2d Cir. 1960).

Having a court determine whether an arbitration panel has in fact made an award in a given case will not further this goal of minimizing litigation. Indeed, it seems certain to impede it. Moreover, such intervention by the court runs counter to the essential concept of arbitration as a dispute-resolution mechanism that has been chosen by the parties themselves. Thus, we decline to determine on behalf of the Emergency Hearing Panel whether an abstention among the members of an otherwise evenly divided panel breaks or perpetuates the deadlock. It is for the EHP in the first instance to make this determination.[6]

Nor is it appropriate on the record in this case to hold that such a determination was in fact made by the Panel at the June 12th meeting. While it is true that Co-Chairman Dickman, a management representative, ruled at that meeting that the motion had carried, it is unclear whether that ruling was based

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6 Even if it were appropriate for this Court to determine what the effect of an abstention should be under the EHP rules, it would be difficult to do so. Certainly, if one looks to the common or unusual understanding of abstention, one might conclude that it should be thought of as an absence, that is, a nonparticipation. The voting procedures of the EHP, however, can hardly be described as common or usual.

on the knowledge that Mr. Costello intended to abstain, or whether it was based on the impression, arguably erroneous, that Mr. Costello's remark about "standing by the contract" reflected a vote in favor of the labor motion. No offer of proof on this issue has been submitted by Mr. Dickman.

The minutes of the meeting suggest that the ruling was based on the belief that Mr. Costello had affirmatively and explicitly voted in favor of the union. If that is true, then it would appear that no award was made since the petitioner has conceded that Mr. Costello in fact abstained. *See* Reply Affidavit of Thomas W. Gleason at page 24, paragraph 17.

Mr. Costello has since indicated that the minutes do not accurately reflect his vote, and the minutes were accordingly corrected by the EHP at its August 16th meeting. Unfortunately, no indication was given as to what effect, if any, this correction was deemed to have on the June 12th vote.

The petitioner has argued that "[w]hen the final vote was taken, the panel was well aware that Mr. Costello was abstaining." *See* Reply Affidavit of Thomas W. Gleason at page 24, paragraph 17. This contention, however, is contradicted by petitioner's own earlier assertions to this Court that Mr. Costello had affirmatively voted in favor of the union's position and that this had been "dispositive of the outcome" of the June 12th vote. *See* Affidavit of Ernest L. Mathews, Jr., at page 21, paragraph 17(b).[7] *See also* Affidavit of Thomas W. Gleason at page 11, paragraph 12(b).

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7 The Affidavit of Mr. Mathews goes on to say:

> Admittedly, the minutes of the meeting which were taken by a secretary and promulgated without review or editing are confusing on this point. They suggest the 9-7 vote with Mr. Costello abstaining. However, the subsequent text dealing with the significance of Mr. Costello's vote confirms what the deponent observed, that his vote was counted for the motion and carried it.
>
> There is no doubt that any management representative who was there would agree that had Mr. Costello *not voted for the motion, the panel would have been deadlocked, no matter how many members were actually present and voting.*

Id. at paragraph 17(c) (emphasis added).

On the basis of the record before this Court, we cannot conclude that Mr. Dickman and the rest of the Panel knew that Mr. Costello was abstaining; that Mr. Dickman's statement that the motion had carried was an intentional, if implicit, ruling on the effect of an abstention; and that the rest of the Panel understood Mr. Dickman to be making such a ruling.[8]

The significance to the shipping industry—both labor and management—of the order issued as a result of the EHP's June 12th meeting is too great to be supported by no more authority or basis than the confused, ambiguous proceedings of the Panel on that occasion. As a matter of law, which in this instance happens also to be consistent with sound policy as we perceive it, we hold that on the present state of the record we cannot conclude that a valid final and binding award emanated from the June 12th meeting of the EHP.

While it is true that "parties contracting for arbitration must be content with its informalities," *see Western Canada Steamship Co. Ltd.* v. *Cia De Nav. San Leonardo Anglo Canadian Shipping Co., Ltd.*, 105 F.Supp. 452, 453 (S.D.N.Y. 1952), the procedures followed cannot be so informal or chaotic that a court called upon to confirm an award has no real assurance that an award in fact was made. The significance of what in fact occurred under the EHP's unique procedure is for the

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8 Petitioner has characterized Respondent's argument that an abstention results in a deadlock as an afterthought, citing the absence of evidence that the point was raised at the June 12th meeting or soon thereafter. Respondent, in turn, characterizes Petitioner's argument that an abstention equals an adverse vote as an afterthought, citing its earlier insistence that Mr. Costello had affirmatively voted in favor of the union's position. These objections only reinforce the Court's belief that while the parties now agree that Mr. Costello abstained, the fact was not clearly apparent to the Panel as a whole on June 12, 1984. Indeed, considering the variety of arguments that have been made about the June 12th vote over the course of this application (*e.g.*, whether the number of panel members actually present is of consequence, whether an alternate is entitled to vote, the effect of an abstention, etc.), we are not even convinced that the Panel as a whole has a basic familiarity with EHP voting procedures. Nor is this necessarily surprising since, as noted earlier, June 12 was apparently the first time that the Panel proceeded by formal vote.

EHP in the first instance to determine with a full appreciation of all the facts and circumstances.

Statutory support for this conclusion can be found in Chapter 9 U.S.C. § 10(d), which authorizes a Court to vacate an award "where the arbitrators exceeded their powers or *so imperfectly executed them that a mutual final and definite award upon the subject matter was not made.*" (Emphasis added.) The more common occasion for invocation of this provision is where the language of the arbitrator's award is unclear, *see, e.g., Bell Aerospace Co. Division of Textron* v. *Local 516*, 500 F.2d 921 (2d Cir. 1974), or where the award leaves unresolved important aspects of the matter submitted for arbitration. *See, e.g., Michaels* v. *Mariforum Shipping S.A.*, 624 F.2d 411 (2d Cir. 1980). It seems equally applicable, however, in the rare case in which the procedures and circumstances under which a vote was taken are so confused that it is unclear whether the arbitration panel in question reached the requisite consensus for issuing an award. In such a case, as in the cases cited above, the existence of a "mutual final and definite award" has been cast into doubt, making judicial enforcement inappropriate. Thus, we hold that Chapter 9 U.S.C. § 10(d) requires that an enforceable award be the product of sufficient procedural regularity so as to permit the court to state with confidence that an award indeed was made.

In other cases involving § 10(d) infirmities, courts have not hesitated to remand the matters to the arbitrator for clarification of the award, and their authority to do so is by now a settled principle of federal common law. *See, e.g., Grand Rapids Die Casting Corp.* v. *Local Union No. 159*, 684 F.2d 413, 416 (6th Cir. 1982). Thus, courts have remanded cases with directors to clarify the scope of an award, *e.g., International Association of Machinists & Aerospace Workers* v. *Southern Pacific Transportation Co.*, 626 F.2d 715 (9th Cir. 1980) (whether overtime pay award applied to similarly situated employees as well as the named claimants), or its precise application, *e.g., Teamsters Local* v. *Penn Transportation Corp.*, 359 F.Supp. 344 (D.Mass 1973) (matter resubmitted to arbitrators to determine how back pay should be calculated

and method to be followed in reinstating employees), or even, most notably, whether an award was made at all with respect to a particular issue. *See United Steelworkers of America* v. *Timken Roller Bearing Co.*, 324 F.2d 738 (6th Cir. 1963) (whether back pay was awarded). A remand to the Emergency Hearing Panel is likewise appropriate here.

Accordingly, this matter is remanded for clarification of the effect, under existing EHP rules and procedures, of Mr. Costello's abstention at the June 12th meeting. The clarification to be obtained on the remand will require the EHP to consider and answer a number of questions. The first is whether any understanding as to the effect of an abstention existed among the parties prior to the June 12th meeting, and, if so, the nature of that understanding.

Second, the Panel should consider and determine whether Co-Chairman Dickman in fact understood that Mr. Costello was abstaining, and correctly ruled under existing EHP rules and procedures, that the June 12th resolution had carried. A determination that he did so may be based either on the ground that his ruling accurately reflected a prior understanding among the Panel as to the effect of an abstention, or on the ground that, in the absence of such an understanding, he was authorized by the Panel to issue a ruling on the subject. If the Panel determines that the June 12th abstention was in substance an "adverse vote"—that is, a vote to be subtracted from management's allotment of eleven votes—it would have the consequence of confirming that an award was made at the June 12th meeting.[9]

If these questions are resolved in Petitioner's favor, and Petitioner renews an application for enforcement in this Court, this Court will then have occasion to review the remaining

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9 If such an award was made by the Panel, whether that award is subject to further consideration or revision by the Panel is another question, which is for the Panel in the first instance to determine. Unless and until the Panel entertains such consideration, its award is final and binding. *See* EHP Rules of Procedure, Exhibit 5 to the Affidavit of Walter A. Niemand, at Paragraph H.

objections raised by the Respondent with respect to enforcement of the award. If the panel determines that a deadlock occurred on June 12th, then the Panel's own procedures on deadlocks determine the subsequent steps to be taken. Finally, if the Panel is unable to agree on the effect of the June 12th abstention, then the consensus required for an award clearly was lacking. In that event, as well, the matter remains open before the Panel, and the Panel members may agree to continue, or to discontinue, discussions aimed at its resolution, or to invoke the deadlock procedures prescribed by the EHP bylaws.

Accordingly, for the reasons stated, the matter is remanded to the EHP for further proceedings not inconsistent with this Opinion.

SO ORDERED.

Dated: New York, New York
October 4, 1984

/s/ LEONARD B. SAND
U.S.D.J.

APPENDIX D

Minutes of the EHP, June 12, 1984

MANAGEMENT-ILA EMERGENCY HEARING PANEL
80 Broad Street
New York, N.Y. 10004
(212) 943-2765

REPORT OF PROCEEDINGS of a MEETING of the MANAGEMENT-ILA EMERGENCY HEARING PANEL held on TUESDAY, JUNE 12, 1984, at 2:00 P.M., recessed and reconvened on WEDNESDAY, JUNE 13, 1984 at 1:00 P.M. in the WHITEHALL CLUB, 17 Battery Place, New York, New York 10004

PANEL MEMBERS PRESENT

Thomas W. Gleason Co-Chairman	James J. Dickman Co-Chairman
John Bowers	F. D. Alspaugh
Donald Carson	David C. Burns
R. H. Wheatley*	Frank M. Cangemi
John Kopp	James G. Costello
James McCleland, Jr.	William J. Detweiler
Perry C. Harvey	James I. Newsome
Alexander Talmadge	Walter Niemand**
R. E. McPherson	R. O. White, Jr.
Walter L. Sullivan	H. Remsen Whitehouse
Robert E. Gleason	
Thomas W. Gleason, Esq. Co-Counsel	C. P. Lambos, Esq. Co-Counsel

* Vice—J. H. Raspberry

** Representing West Gulf Maritime Association

PANEL MEMBERS NOT PRESENT

James T. Moock	James E. Smith
Anthony Pimpinella	

ALSO PRESENT

James E. Watson, Jr., Esq. Francis A. Scanlan, Esq.
Louis W. Macijeski

Also present were representatives of ILA Union Locals and Steamship companies which were parties to the grievances to be heard. The original registration sheets were ordered appended to the Report of Proceedings, and made a part thereof.

* * * * *

Min. 6 GALVESTON, TEXAS—Local #20, ILA against West Gulf Maritime Association complaint that heavy lift operators (Port-O-Packer operators) are assigned out of the 20-man gang (Letters of May 22, 1984 and June 7, 1984 attached)
(Item #6 on the Agenda)

With respect to the above grievance, Co-Counsel Lambos advised that it is Management's recommendation that the matter be tabled until such time as the local grievance procedure has been followed.

Mr. Wheatley stated that the grievance does not involve a local issue but is in fact a violation of the Master Contract.

Mr. Gleason stated that the grievance as set forth has nothing to do with the loading and stripping of containers. The grievance involves the use of gang men as drivers which is a violation of the Contract but not the Rules on Containers.

Co-Counsel Lambos stated that the Local Agreement does provide for a two step grievance procedure and that the second step has not been completed.

Co-Counsel Gleason stated that the 20 Man Gang is spelled out in the Containerization Agreement. Someone has to say what the intentions of the parties are. The request that this matter be brought before this Panel was presented by Mr. Raspberry. It is a question of uniformity up and down the Coast. This problem exists in Charleston and probably in Savannah.

Co-Counsel Lambos stated that Mr. Neimand had advised that the management individual involved in this matter is not

present and had not been advised that the matter was to be considered today.

At this point, Mr. Neimand stated that it was his understanding that the company involved (Port-O-Packer Operators) and the Local Union had reached an agreement.

Mr. W. H. Nelson, President of Local 20, stated that the company is not ordering the men as it did previously—it now takes six or eight drivers out of the gang.

Co-Counsel Lambos stated that Management would take this matter up in Executive Session.

Mr. Wheatley stated that the parties should be given some guidance from this Panel so that they will know how to proceed.

In response to a question as to how long this situation has existed, Mr. Wheatley replied "for the duration".

Later in Executive Session:

Co-Counsel Gleason stated that this situation has arisen as a result of the so called "Norfolk Agreement". He noted that when this was brought out the ILA said it knew nothing about it. The Agreement signed for 1977-80 provided for an 18 plus 2 man gang. If a company needs additional drivers they do not come out of the gang—extra men are ordered.

Co-Counsel Lambos stated that it is the position of Management that the issue, as requested by the West Gulf Maritime Association, be referred back to the second step of the Grievance Procedure as required by the Management-ILA Emergency Hearing Panel.

As to the Union's request that this Panel issue an interpretation as to the manning and structure of gangs, the Contract states that a container gang shall consist of 18 men plus two drivers. Management reiterates its view that there be at least 20 men working in a container gang as provided by the Collective Bargaining Agreement. It is management's view that this practice is lived up to in each of the Ports but that there is a difference in each of the Ports with respect to the gang structure. Again, Management reiterates it position that the matter be referred back for local determination.

Co-Chairman Gleason stated that it is the Union's position that it will not work unless the Master Agreement is lived up to.

Co-Counsel Lambos stated that the position has been that each Port has lived up to its ideas of that agreement from 1976 to the present time and that it has been done without change. When management agreed to the September and January Agreements they did so on the basis of what their particular ports were doing. To tell these people to go back and revise their methods of doing business is considered inappropriate by management. The matter should go back to Galveston where it belongs. In the interim, the parties will seek to find a solution to this problem.

Co-Chairman Gleason stated that he will tell his people not to work and tie the place up.

Co-Counsel Lambos replied that "with all due respect, that is not the proper way". What is being asked for would involve change and revision of contractual provisions in effect since 1976, something that he felt should not be addressed here.

Co-Chairman Gleason stated that the Contract has not been changed since 1968. What is being discussed is the distribution of the men—this was made very clear to the Committee. In New Orleans it was found that it was wrong and the situation was corrected with Mr. Burns.

Co-Counsel Lambos stated that whatever Mr. Burns agreed to, he will live up to. The composition of the gang has always been different in every Port. This has always been a problem since the very inception. It has been discussed time after time. It has meant different things in different ports. It does not mean the same thing in every port.

Co-Chairman Gleason stated that when the Agreement was signed in January—it stated 18 men plus two—drivers were extra.

Co-Counsel Gleason stated that the parties have a Master Agreement—this issue cannot be left to the local area. The Containerization Agreement is very clear. Everyone in New York abides by it.

Co-Chairman Gleason stated that when he was down in the South Atlantic the employers spoke about the "Norfolk Agreement"—that was the first time he heard about it. The parties have a Master Contract and Rules that apply to everyone. Every one has to have the extra drivers coming out of the gang or no one will have it. The local unions are just as bad—they are using one Port against another.

Co-Counsel Gleason stated that whatever the rule is—it has to be uniform for everyone.

Co-Counsel Lambos stated that management has no opposition to agreeing that 18 plus two means 20 men who can be assigned anyway the employer desires. If a situation existed where there was a need or necessity for these additional people that would be something else—however you are saying to put more people to work just for the sake of putting them to work.

Co-Chairman Dickman stated that management will abide by whatever is in the Master Agreement.

Mr. Bowers stated that when negotiations were carried on down South, the local unions were told that if any local was found violating this provision it would be put into Trusteeship. Mr. Bowers asked if it were fair that New York abided by this provision while everyone else was "jumping" on the "Norfolk Agreement". It was never intended that six men be taken out of the gang. New York is at a serious disadvantage because of this.

Co-Counsel Gleason asked why should the Master Agreement be applied differently in New York than it is in any other Port.

Co-Counsel Lambos stated that it means 20 men with a distribution different than any other Port.

Mr. Kopp raised a question as to whether lashers were to come from the gang.

Mr. Bowers asked why was New Orleans forced to accept the 18 man gang and not the other Ports.

Co-Counsel Lambos stated that it is very clear that in every Port the provision is interpreted differently—every Port does it its own way. The Contract does not spell out that there shall be 18 men plus two and that you cannot use these men as lashers and drivers.

Co-Chairman Gleason stated that the lashers and drivers are extra and are not to come from the 20 man gang.

Co-Counsel lambos reiterated his earlier position that this body should not be discussing this issue—it should be down in the West Gulf.

Co-Chairman Gleason stated that the ILA gave its word on the Lash Agreement—it did not need a piece of paper—what it says will do, it does.

Co-Chairman Gleason stated that the Rules on Containers are being violated by the same people who are not living up to this. He then suggested that a vote be taken up on this issue.

Co-Counsel Lambos stated that Management's position had been expressed.

Co-Chairman Gleason stated that it is not what was said during negotiations.

At this point, the Management Members of the Panel left the room for purposes of caucusing.

Upon their return, Mr. Dickman advised the meeting that management's position remained as stated.

Co-Counsel Gleason asked if it meant that the carriers want a different agreement in every Port.

Co-Counsel Lambos replied no.

Co-Counsel Gleason disagreed with Co-Counsel Lambos and stated that what management is saying is that it should be different in every Port.

Co-Counsel Lambos stated that the carriers have taken a position—they want things to be the same as they have been for the last eight years.

At this point, Mr. Bowers made a motion that the gang size shall be 18 plus two with drivers added to the twenty.

At this point a vote was requested. The members of the Panel present were polled. The results are as follows:

John Bowers	Yes
J. H. Raspberry	ABSENT
Donald Carson	yes
James T. Moock	ABSENT
John Kopp	yes

James McCleland, Jr.	yes
Perry C. Harvey, Jr.	yes
Anthony Pimpinella	ABSENT
Alexander Talmadge	yes
R. E. McPherson	yes
Robert E. Gleason	yes
Walter L. Sullivan	yes
F. D. Alspaugh	no
C. David Burns	no
Frank M. Cangemi	no
James G. Costello	*
William J. Detweiler	no
James I. Newson	no
Orville H. Hall	ABSENT**
James E. Smith	ABSENT
R. O. White, Jr.	no
H. Remsen Whitehouse	no

* When polled, Mr. Costello stated that he would abstain from voting however, he subsequently stated that he would stand by the Master Contract. This was considered to be a vote in favor of the motion.

** Mr. Neimand voted no, but was subsequently determined that alternates were not entitled to cast a vote.

At this point, Mr. Detweiler stated that in 1974 when this issue was discussed there was failure to agree because of the varying interpretations in the different Ports. The final position was agreed to, in his mind, because it said 20 men. It was left unsaid as to what would happen when extra drivers were required.

Co-Chairman Gleason stated that Mr. Costello could not vote against the motion because that is what New York is doing. The reason the parties agreed to 20 men was because the original number was 16 plus 2. The motion should be carried.

At this point, Mr. Dickman stated that a motion has been made and carried—there was a vote. He stated that he believed Mr. Costello understands what he is saying. Mr. Dickman went

on to say that a motion cannot be changed unless there is a second motion to be placed against it.

Therefore, on the basis of a motion having been presented and voted upon it was

> RESOLVED: That in accordance with the provisions of the Master Collective Bargaining Agreement, negotiated by and agreed to by the parties, the minimum size of a container gang shall be 18 men plus two drivers and that should additional drivers be required such drivers are to be drawn from outside the gang and shall not be part of the 20 man gang.

Co-Chairman Gleason requested that the above resolution be circulated to all carriers, Port Associations and ILA Locals.

At this point the grievances against Delta Steamship Lines, Inc. were heard and Awards issued (See Min. 4).

The meeting was then adjourned and scheduled to reconvene on Wednesday, June 13, 1984 at 1:00 P.M.

APPENDIX E

EHP Rules on Procedure

MANAGEMENT-ILA EMERGENCY HEARING PANEL
Co-Chairman

Thomas W. Gleason
17 Battery Place
New York, N.Y.
10004
(212) 425-1200

James J. Dickman
80 Broad St.
New York, N.Y.
10004
(212) 747-370?

July 2, 1981

To the Members of the Panel:

We enclose for your information a revised copy of the Management-ILA Emergency Hearing Panel Rules on Procedure.

Changes have been made in the document (a) to give the right to appear and be heard to those against whom grievances have been filed, and (b) to provide that if either side fails to appear the other side may continue and issue an Award having the same effect as if both sides were present.

We look forward to many effective meetings in the future, which will resolve the troublesome areas in dealing with the Containerization Agreement.

Best wishes,

Sincerely,

/s/ THOMAS W. GLEASON
Thomas W. Gleason

/s/ JAMES J. DICKMAN
James J. Dickman
Co-Chairman

MANAGEMENT-ILA EMERGENCY HEARING PANEL

RULES OF PROCEDURE

A. Meetings of the Management-ILA Emergency Hearing Panel may be called by the President of the ILA and the President of NYSA jointly or by any three (3) members of the panel acting jointly.

B. While five (5) days notice of meeting shall be given whenever possible, meetings may be called on short notice by telephone. In any event, sufficient time shall be permitted by the notice for the various members of the panel to congregate.

C. The place of meeting shall be designated in the Notice of Meeting and may be in any port city or other place convenient to the members of the panel.

D. A quorum shall consist of a majority of each side of the panel and each side of the panel shall have an equal number of votes.

E. Each side shall have the right to designate alternates. Alternates shall have the right to participate and vote only in the absence of the member of the panel whom they represent.

F. The procedure to be followed during any meeting or hearing shall be informal. The Panel may determine whether to take testimony or to accept proof in any reasonable form acceptable to the Panel. Any person against whom a grievance has been filed shall have the right to appear at any hearing, after notice, and present such evidence as may be reasonably necessary to support his position.

G. Determinations of the Panel shall be rendered by a majority vote of the Panel, provided that a quorum, of at least one side, is present at the time of voting. Votes must be cast in person, and no proxies may be used except that alternates may vote in the absence of the person whom they represent. If either the Management or the ILA members, or any of them, fail to appear, after notice, the other side may continue the

meeting and issue an award which shall have the same effect as if both sides were represented at the meeting.

H. The decision of the panel rendered by a majority vote thereof shall be final and binding and shall constitute an enforceable Award. The Panel may direct Counsel to obtain judicial enforcement of such Award in the event that the Panel believes that such enforcement is necessary.

I. The Panel shall have Co-Chairmen, one of whom shall be the President of the ILA, and the other the president of the New York Shipping Association. The Panel may also appoint a Secretary for the purpose of keeping a record of the proceedings, which minutes need not be a verbatim record of the entire proceeding, it being sufficient that the substance of the issue and the Award of the Panel be set with specificity.

J. The Expenses of the Panel shall be shared equally by the ILA and Management, each side determining for itself the internal allocation of their respective expenses.

APPENDIX F

Affidavit of James I. Newsome, Jr. with Exhibits

AFFIDAVIT OF JAMES I. NEWSOME, JR.

PERSONALLY APPEARED before the undersigned officer duly authorized to administer oaths, JAMES I. NEWSOME, JR., who being duly sworn deposes and says that:

1. He is Chairman of the South Atlantic Employers Negotiating Committee and President of the Savannah Maritime Association and is familiar with the negotiations between the South Atlantic Employees and Employers Negotiating Committees as well as the negotiations between International Longshoremen's Association, Local 1414 and the Savannah Maritime Association.

2. Attached hereto as Exhibit "A" is a true and correct copy of the Agreement signed in Norfolk, Virginia on October 14, 1976 between the South Atlantic Employers Negotiating Committee, C. W. Pidgeon, Chairman, and the South Atlantic Employees Negotiating Committee, Landon L. Williams, Chairman (the "Norfolk Agreement").

3. The Norfolk Agreement established the agreement in the South Atlantic Ports (principally Tampa, Florida, Jacksonville, Florida, Savannah, Georgia, Charleston, South Carolina and Wilmington, North Carolina) that a container gang consisted of nineteen (19) men including a Header and a maximum of six (6) drivers, with lashers in addition when required.

4. Attached hereto as Exhibit "B" is a true and correct copy of a letter dated December 2, 1977 from C. W. Pidgeon, Chairman of the Savannah Maritime Labor Committee, to the members of the Association, setting forth the revised agreement in Savannah, Georgia that a container gang consisted of twenty (20) men including a maximum of eight (8) drivers.

5. That at all times since November 30, 1977 a container gang in the Port of Savannah, Georgia has consisted of twenty (20) men including a maximum of 8 drivers, with lashers in addition.

6. That during the negotiations leading to the execution of the currect collective bargaining agreement in the South Atlantic, the South Atlantic Employers Negotiating Committee refused to change the container gang structure as set forth in Paragraph 5 above.

7. The South Atlantic Employers Negotiating Committee and the Savannah Maritime Association would not have executed the currect collective bargaining agreements if the agreement were that additional drivers above two (2) were to be hired in addition to a 20-man container gang. In addition, if such were the case, they also would not have agreed to lashers being hired from outside the gang since this would have placed the South Atlantic ports at a competitive disadvantage with respect to ports outside the South Atlantic where lashers come from within the 20-man container gang.

THIS *1st* day of February, 1985.

/s/ JAMES I. NEWSOME, JR.
James I. Newsome, Jr.

Sworn to and subscribed
before me this 1st day of
February, 1985

/s/ (Illegible)
Notary Public, Chatham
County, Georgia

EXHIBIT "A"

Norfolk, Va.
October 14, 1976

1. A container gang consists of 19 men including a Header a maximum of 6 men may be drivers with the rest of the men employed as needed by not in lashing or unlashing.
2. When lashing or unlashing is required a lashing gang consisting of 1 Header and six men will be used. At the employers option the men may be brought in one hour before the start.
3. The stuffing and stripping gang will be composed per Section 51 paragraph #1 of the Hampton Roads agree. (See attached sheet)
4. On barges a 19 man container gang will be used and the gang will also lash/unlash.
5. The employers will cease using a "heavy lift gang" for containers on any vessel and will use a container gang.
6. The above becomes effective Wednesday, October 20, 1976.

C.W. Pidgeon, Chairman
S. A. Employers Committee

Landon L. Williams
ILA

EXCERPT FROM HRSA/ILA LONGSHORE AGREEMENT

SECTION 51

Rules and Conditions Covering Handling of Containers in Hampton Roads

1. SIZE OF GANGS FOR STUFFING AND/OR STRIPPING OF CONTAINERS

When stuffing or stripping containers at pierside or in the terminal area, a header and three (3) men will be used. Additional men are to be employed at the Employer's discretion; however, it is understood that when stuffing or stripping is carried out by hand not less than two (2) men per container wiil be used.

2. On loaded containers which are stuffed or unstuffed by other than ILA longshore labor, the amounts set forth below shall be paid into an ILA Royalty Fund, for such distribution and administration as may be determined by its Trustees.

EXHIBIT "B"

SAVANNAH MARITIME ASSOCIATION
P.O. Box 96
Savannah, GA 31402

Anthony V. Ryan, Sr.
Secretary

December 2, 1977

Associated Stevedores, Savannah
Carolina Shipping Company, Savannah
Eller & Company, Savannah
Harrington & Company, Savannah
S & H Shipipng Company, Inc., Savannah
Smith & Kelly Company, Savannah
South Atlantic Terminals, Inc., Savannah
Stevens Shipping Company, Savannah
TTT Ship Agencies, Inc., Savannah
United States Lines, Inc., Savannah
Wilkes Shipping Agency, Inc., Savannah
Rouvres Steamship Agency, Inc., Savannah
Zim Container Services, Savannah
Norton Lilly Company, Savannah

Gentlemen:

The Labor Committee met with Reverend Jackson and other officers of Local 1414 today and agreed on the following procedures at Savannah:

1. New pay scales and conditions became effective when work commenced under the new contract at 8:00 A.M. Wednesday, November 30, 1977.

2. The date retroactive pay from June 1, 1977, to 8:00 A.M. Wednesday, November 30, 1977, will be provided is to be agreed upon by the District Committee.

3. In Savannah where it has been customary to employ Driver Headers, the Driver Header cannot leave a gang if he is part of the gang structure. If the employer wishes to have a Driver Header supervising the work of drivers in all gangs, he must be extra above the gang structure, but each gang may have its own Driver Header as part of the gang structure if he is properly paid and remains with the gang. The employer is not required to have any Driver Headers if he wishes to have the Gang Header employ and supervise the Drivers.

4. The SEMCO barge may continue to use the container gang to lash but must observe the new 20-man gang.

5. The 20-man container gang may supply a maximum of 8 Drivers, including the Driver Header if part of the gang. Drivers above 8 must be extra.

6. When 7:00 A.M. or 8:00 A.M. gangs are cancelled for weather conditions and the 4-hour call time is incurred, it is the timekeeper's responsibility to get the cards of the men involved from the delegate at the Hall.

7. When stripping or stuffing, the gang will continue to have a Header and 3 men. The three men may be either Drivers or men, but if working breakbulk in a container, at least two of the men must be assigned to hand work in the container. The Checker must also be present.

8. The Union undertakes to insure that 8:00 A.M. orders will return after 6:00 P.M. supper or will supply replacements under Clause 8 (D). The employer is to notify the hall at 3:00 P.M. if replacements are needed, and if he finds replacements necessary after 3:00 P.M., he is to notify the Hall immediately. The employers will not, under normal circumstances, expect 8:00 A.M. men to work past midnight, although for unusual reasons, such men will work through the midnight meal to complete a ship.

9. The Union undertakes to insure that 1:00 P.M. orders will work the full night shift, and employers are requested to advise men so ordered when they will be required to work after midnight so the Union can arrange any necessary replacements.

10. The employer is to notify the G.A.I. representative of names and Social Security numbers of men refusing to return after meals or leaving the job.

11. The Union is to advise the Association Labor Committee whenever any Company attempts to keep 8:00 A.M. orders past midnight.

12. Strachan is to arrange Flintkote working schedules so there is more than one Bulldozer Driver working alone in a ship.

Yours very truly,

/s/ C. W. PIDGEON

C. W. Pidgeon, Chairman
Labor Committee

CWP/lc

ccs: Mr. A. V. Ryan, SMA
Mr. H. Pate, Tampa
Mr. V. McDaniel, Jacksonville
Mr. R. Whetsell, Charleston
Mr. P. Ruffin, Jr., Wilmington
Reverend E. Jackson, President, Local 1414
Mr. R. E. Banks, Savannah
Mr. P. Norboge, Savannah

APPENDIX G

Tampa Agreement, May 4, 1981

MEMORANDUM OF UNDERSTANDING

Management, the Carriers and ILA have conferred in Tampa, Florida during the week of May 4, 1981, on the very serious problems in the industry which have resulted from the issuance of an injunction against the rules on Containers by the District Court for the District of New Jersey on February 23, 1981. Concerned by the apparent intervention of the FMC on industry implementation of the Rules, as exemplified by Docket No. 81-11, the parties agree that the following action is necessary during the duration of the injunction, for the continued protection and preservation of the work opportunities of the work force covered by the Management-ILA collective bargaining agreements:

I. *Containerization Agreement*: It is understood that the part of the agreement dated May 27, 1980 entitled "Containerization Agreement", not including the Rules on Containers, is in full force and effect and its provisions are to be rigidly enforced in order to protect against the further reduction of the work force. Such Containerization Agreement defines the work jurisdiction of employees and prohibits the subcontracting out of any of the work covered by the Agreement.

II. *Enforcement of Containerization Agreement—Money Damages*: The parties agree that the enforcement of these provisions is especially important now that the Rules have been enjoined and that any violation of such other provisions is of the essence of the Agreement. The Union shall have the right to insist that any such violations be remedied by money damages to compensate employees who have lost their work. Because of the difficulty of proving specific damages in such cases, it is agreed that, in place of any other damages, liquidated damages of $1,000. for each violation shall be paid to

the appropriate Welfare and Pension Funds. Liquidated damages shall be imposed by the Committee provided in paragraph IV below.

III. *Contract Breached*: Management believes that there may have been violation of work jurisdiction, of subcontracting clauses, and the Containerization Agreement, by steamship carriers and direct employers. These clauses in the Containerization Agreement shall be rigidly enforced by the parties.

IV. *Emergency Hearing Panel*: In order to correct all violations and resolve all grievances it is agreed that an emergency panel of an equal number of representatives from each side shall be named by the President of the ILA and by Management for the purpose of hearing and resolving all cases relating to the Containerization Agreement, on an emergency basis at the earliest possible moment. It is agreed that the first of such meetings shall be convened in New York not later than the month of May, 1981. The Committee shall hold such further meeting, on an emergency and expedited basis, to the fullest extent necessary to resolve the above issues.

V. *FMC Abolition*: The parties also further agree that the FMC is continuing to intrude into the labor-management affairs of the parties, which comes within the sole jurisdiction of the National Labor Relations Board. Imposition of duplicative Federal jurisdiction is contrary to the rights of the parties and to the advancement of the public interest. The parties therefore will embark upon an intensive legislative program to make clear that the FMC's jurisdiction over all labor relations matters, except assessments, has been taken away by the 1980 legislation. The legislative program shall also embrace such other and further activities in support of the Rules on Containers, as may be necessary, which shall also include opposition to any measures such as the McCloskey Bill which would impede collective bargaining in this industry.

VI. *Productivity Improvement*: The parties further agree that all steps necessary shall be taken to induce the return of containerization work back to waterfront facilities. To that

end, and in order to make the industry more competitive with off-pier operations, it is agreed that the rate of productivity for stuffing and stripping containers shall be determined by the employers consistent with the requirements of safety, any contract provisions or custom and practices to the contrary notwithstanding.

VII. *Wage Scale Meeting*: The parties further authorize the President of the ILA and the President of NYSA to convene a special Wage Scale Committee meeting of the Management and ILA in the event that the above understandings do not product the desired result, after a suitable opportunity has been given for experience thereunder to develop.

MADE this 4th day of May, 1981, in the City of Tampa, by Management and the International Longshoremen's Association, AFL-CIO.

APPENDIX H

Hollywood Agreement, June 19, 1981

This Agreement made this 19th day of June, 1981 in the City of Hollywood, State of Florida, by and between New York Shipping Association, Inc., Council of North Atlantic Shipping Associations, West Gulf Maritime Association, New Orleans Steamship Association, Mobile Steamship Association, Southeast Florida Employers Association, South Atlantic Employers Negotiating Committee and Carriers Container Council, for and on behalf of all steamship carriers, direct employers, terminal operators and other employers of waterfront labor employing employees employed under the Master Agreement (hereinafter collectively referred to as "Management") and the International Longshoremen's Association, AFL-CIO, Atlantic Coast District ILA, AFL-CIO, South Atlantic and Gulf Districts, AFL-CIO, and each and every constituent local of said ILA and its districts in the 36 ILA ports from Maine to Texas (hereinafter collectively known as "the ILA"),

WITNESSETH:

WHEREAS, the parties hereto have made several efforts since the decision of the Supreme Court of the United States on June 20, 1980 to continue to protect and preserve the work jurisdiction of employees covered by the terms of the Master Agreement and agreements entered into thereunder, including the Agreement of December 6, 1980, the Resolution of March 26, 1981, the Tampa Agreement of May 4, 1981, the Charleston Agreement of May 19, 1981, and

WHEREAS, the terms of the December 6, 1980 Agreement have been enjoined by the action of the Federal District Court for the District of New Jersey which has been affirmed by the Court of Appeals for the Third Circuit and as to which the parties have now petitioned for certiorari to the Supreme Court of the United States, and

WHEREAS, the Rules on Containers which are a basic part of the agreement between Management and the ILA are now enjoined and may not be implemented, and

WHEREAS, the Containerization Agreement contained in the Master Agreement has not been enjoined and may be implemented, and

WHEREAS, the provisions of the Master Agreement relating to the maintenance and repair of containers has been implemented by the May 19th Charleston Agreement, and

WHEREAS, the parties hereto desire to continue to preserve and protect the work jurisdiction of employees covered by the ILA Master Agreement to the fullest extent permitted by law, and

WHERAS, the parties hereto have agreed that the Carriers shall create a new Work Incentive Program whose purpose shall be to seek to encourage the continuance and improvement of the number of containers stuffed and stripped on container waterfront facilities,

NOW, THEREFORE, the parties agree as follows:

WORK INCENTIVE PROGRAM

1. Management and the steamship carriers agree that they shall take all necessary action to continue and increase, on a port by port basis, the number of containers stuffed or stripped by the industry at waterfront facilities with employees covered by the Master Agreement. The Carriers also pledge themselves to assiduously solicit from their customers and trade LTL work for performance by employees covered by the Master Agreement and to issue weekly reports on the amount of tonnage being stuffed and stripped.

2. The Carriers agree to establish, as an amendment to JSP, a Fund to which will be contribued by containerized automatee cargo during the remainder of the life of this Master Agreement the sum of $10,000,000. to establish a Work Incentive Program.

3. The purpose of the Work Incentive Program will be to encourage the continuance and improvement in the number of containers stuffed and stripped at container waterfront facilities by employees covered by the Master Agreement. The Program itself, and the details of such Program, are to be worked out with the ILA immediately beginning on Monday, June 22, 1981.

4. It is agreed, however, that the Work Incentive Program shall remain in effect only so long as the implementation of the Rules on Containers is enjoined, and that when, and if, the Rules are placed back into effect the Work Incentive Program shall terminate.

IMPLEMENTATION, ENFORCEMENT AND PRODUCTIVITY

5. The provisions of the Containerization Agreement shall be implemented by the enforcement procedure set forth in Paragraph "6" below. It is also agreed that the effective implementation of this Agreement requires the full cooperation of all parties in the enforcement of the productivity provision set forth in Paragraph VI of the Memorandum of Understanding of May 4, 1981. Any employee who fails to meet the productivity standards established by his local employer as set forth in accordance with such paragraph shall be disciplined in accordance with the provisions of the local port agreements.

6. Management, the Carriers and Direct Employers hereby re-affirm and clarify the enforcement procedures which will be followed in order to protect and preserve the work of the ILA which is covered by the said Master Agreement. The enforcement procedures shall be as follows:

A. An initial charge of alleged violation of the Containerization Agreement in the Master Agreement shall be heard under the procedures agreed upon in the local port by the local Port Association and the local representatives of the ILA. Such procedures shall be completed within ten days after the charge is filed.

B. Where there is a failure to agree on the local level, or where a party desires to appeal any decision rendered pursuant to Step One in Paragraph (1) above such cases shall be referred to the Management-ILA Emergency Hearing Panel referred to below.

C. The Management-ILA Emergency Hearing Panel shall consist of the following members

(i) *Representing Management*

NEW YORK SHIPPING ASSOCIATION, INC.—	1
COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS—	1
WEST GULF MARITIME ASSOCIATION—	1
NEW ORLEANS STEAMSHIP ASSOCIATION—	1
MOBILE STEAMSHIP ASSOCIATION—	1
SOUTHEAST FLORIDA EMPLOYERS ASSOCIATION—	1
SOUTH ATLANTIC EMPLOYERS NEGOTIATING COMMITTEE—	1
CARRIERS—	2
DIRECT EMPLOYERS—	2

(ii) *Representing ILA*
An equal number of ILA Vice Presidents, or other ILA representatives are to be designated by the President of the ILA

(iii) A quorum shall consist of a majority of each side of the panel and each side of the panel shall have an equal number of votes. Each side shall have the right to designate alternates.

(iv) The decision of the panel, rendered by a majority vote thereof shall be final and binding and shall constitute an enforceable award. In the event of deadlock by the Panel, the President of the ILA and the President of NYSA shall select (within two days of the deadlock) a third party to break the deadlock.

D. Appeals from a decision by the local port association and the ILA, under Step One, must be taken within twenty (20) days after such decision. Pending such appeal work will continue.

E. The ILA shall have the right to refuse to render service to any carrier or direct employer (but only with respect to the carrier charged) who, after a determination under Steps One or Two above, has been found to have violated the provisions of the said Master Agreement, and who refuses to abide by the decisions rendered under Steps One and Two above, and the provisions of any no-strike clause shall be rendered inapplicable in such situation.

F. Charges of alleged violations of the Master Agreement involving more than one port shall be referred directly to the Management-ILA Emergency Hearing Panel for final determination.

7. Except as modified by the above, the Master Agreement of May 27, 1980 executed by the above members of management and the ILA, as may have been amended by subsequent Memoranda and Agreements, shall continue in full force and effect, including without limitation the provisions of paragraph "8" of the Containerization Agreement.

IN WITNESS WHEREOF the parties hereto have set their hand the day and year first above written.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO

By /s/ (illegible)

President

ATLANTIC COAST DISTRICT
ILA, AFL-CIO

By /s/ (illegible)
President

By /s/ (illegible)
Secretary

SOUTH ATLANTIC AND GULF
DISTRICT, ILA, AFL-CIO

By /s/ (illegible)
President

By /s/ (illegible)
Secretary

NEW YORK SHIPPING
ASSOCIATION, INC.

By /s/ (illegible)
President

COUNCIL OF NORTH ATLANTIC
SHIPPING ASSOCIATIONS

By /s/ (illegible)
President

WEST GULF MARITIME
ASSOCIATION

By /s/ (illegible)
President

NEW ORLEANS STEAMSHIP
ASSOCIATION

By /s/ (illegible)
President

MOBILE STEAMSHIP ASSOCIATION

By /s/ (illegible)
President

By /s/ (illegible)
Secretary

SOUTHEAST FLORIDA EMPLOYERS ASSOCIATION

By /s/ (illegible)
President

By /s/ (illegible)
Secretary

SOUTH ATLANTIC EMPLOYERS NEGOTIATING COMMITTEE

By /s/ (illegible)
Chairman

CARRIERS CONTAINER COUNCIL

By /s/ (illegible)
Chairman

APPENDIX 1

Amendatory Agreement, July 29, 1983

AGREEMENT AFTER RENEGOTIATION UNDER PARAGRAPH "8" OF THE CONTAINERIZATION AGREEMENT

Approved—AUG 04 1983—Federal Maritime Commission

1. REOPENING

The ILA had served Notice of Reopening on June 30, 1983 pursuant to the provisions of paragraph "8" of the Containerization Agreement. Pursuant to such Notice, the parties to the Collective Bargaining Agreement, together with the Carriers Container Council have met for the purpose of renegotiating a method of more diligent and effective enforcement of the Rules on Containers. This Memorandum of Understanding does not change the Rules on Containers in any manner but merely serves to strengthen and implement the provisions of Rule Nine dealing with the interpretation and enforcement of the Rules. This Agreement deals only with interpretation and enforcement of the Rules on Containers; it does not have any effect on manning or staffing.

2. DOCUMENTATION

A.) Every carrier shall make available to the Management-ILA Container Committee or to the local Port Committee or to the ILA representative or any other agency designated by the Management-ILA Container Committee as an inspection agency, any and all documentation relating to containers required to be maintained by it and made available to the United States Customs Service.

B.) The following information and documentation required pursuant to Rule 9 shall be maintained by each Carrier. In the event such documentation is not so maintained, the Manage-

ment-ILA Container Committee shall impose liquidated damages in accordance with the provisions of paragraph 7 hereof:

Import Cargo:

1. Every carrier shall maintain a listing, by individual ship's voyage, which listing shall set forth the identity of all Rule 1 containers which are required to be discharged by deepsea ILA labor.

Each carrier shall see to it that such a list is prepared from the ship's manifest by a member of the ILA at the pier. Each carrier shall make available to the policing agency or to the local ILA-Management Container Committee, or to the ILA representative, the necessary documentation in support of such listing as set forth in 2, 3, 4 and 5 below. In addition thereto, Rule 1 containers shall have available adequate proof that such container was discharged by deepsea ILA labor, including but not limited to tally sheets containing the time of starting and finishing of the operation and a description of the cargo discharged.

2. A delivery order shall be maintained at the Delivery Clerk's office on all import containers. Such delivery order shall contain the following information:

a. The name or names of the person to whom the cargo is being delivered.

b. The name of the qualified consignee of the cargo, if a person other than in "a" above.

c. The weight of the cargo.

d. A description of the cargo.

e. The final destination of the container.

f. The identity of the inland carrier handling delivery of the cargo.

3. The listing provided in 1 above shall further be supported by a copy of the inward foreign freight manifest which shall be available for all voyages of each ship, except in the Puerto

Rican trade, where such manifests are not maintained and where Bills of Lading or freight bills shall be available for inspection in place of the manifest.

4. An historical file on each container shall be made available to show the movement of the container at any time period in question.

5. A delivery record shall be made available to show that the contents of the Rule 1 containers were delivered in compliance with the Rules and to permit such further inquiry as may be necessary on a case-by-case basis.

6. The above documentation shall be maintained for a period of six months from the date of arrival of the vessel.

Export Cargo:

1. Each carrier shall maintain a listing by a member of the ILA at the pier of all Rule 1 containers, which listing shall be prepared as soon as possible after the completion of the loading of a ship. As in the case of import cargo, such listing shall be on a voyage basis. Each carrier shall make available the necessary documentation to support such listing.

Each carrier shall see to it that such a list is prepared by a member of the ILA at the pier. Each carrier shall make available to the policing agency or to the local ILA-Management Container Committee, or to the ILA representative, the necessary documentation in support of such listing as set forth in 2, 3, 4 and 5 below. In addition thereto, Rule 1 Containers shall have available adequate proof that such container was loaded by deepsea ILA labor, including but not limited to tally sheets containing the time of the starting and finishing of the discharging operation and a description of the cargo discharged.

2. Each carrier shall maintain a copy of the dock/cargo receipt on every export container at the Receiving Clerk's office. Such dock/cargo receipt shall set forth the following information:

No. 85-60

Supreme Court, U.S.
FILED
AUG 10 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

WEST GULF MARITIME ASSOCIATION, COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS, NEW ORLEANS STEAMSHIP ASSOCIATION, NEW YORK SHIPPING ASSOCIATION, INC., and SOUTH ATLANTIC EMPLOYERS NEGOTIATING COMMITTEE,

Petitioners,

—against—

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

THOMAS W. GLEASON
90 Broad Street, Suite 600
New York, New York 10004
(212) 425-3240

Attorney for Respondent

Of Counsel:

ERNEST L. MATHEWS, JR.
SUSAN G. BARRES

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No. 85-60

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Petitioners,

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Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

The petition in this case is patently unworthy and should be denied.

Petitioners suggest that both the Second Circuit and the district court disregarded the fundamental principle of the law of arbitration, that the threshold decision as to whether there is an agreement to arbitrate and an issue arbitrable under that agreement is for the court. Pet. at 10-12.[1] The suggestion is manifestly false.

The existence of an agreement to arbitrate and a dispute falling within that agreement could not be clearer. The "Tampa" Agreement of May 4, 1981, Appendix G to Peti-

[1] References to the petition are denoted as Pet. at —.

tion, to which all petitioners admit they are parties, established the Emergency Hearing Panel (EHP) to hear and resolve "all cases relating to the Containerization Agreement" of the Management-ILA Master Contract. Pet. at 50a. The grievance in this case involved ¶ 5 of the Containerization Agreement and alleged that local practices in Galveston and Houston violate its requirement that the minimum size of a container gang be 18 men plus two drivers. Pet. at 18a.

Far from abdicating its judicial function, the district court decided the threshold questions. It did not wax overlong stating the self-evident, but specifically held:

> The EHP unquestionably has the authority to determine whether an issue is covered by the containerization provisions of the Master Contract. *Such authority is a necessary part of its general authority, expressly granted by the parties, to resolve disputes relating to the containerization provisions.*

Pet. at 10a. (emphasis supplied)

Having found an agreement and a dispute arbitrable under the agreement, the district court, in accordance with well-established law,[2] correctly declined to substitute its judgment for the decision of the panel. The court of appeals correctly affirmed.

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[2] *United Steelworkers* v. *American Manufacturing Co.*, 363 U.S. 564, 567-9 (1960); *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 584-5 (1960); *United Steelworkers* v. *Enterprise Wheel and Car Corp.*, 363 U.S. 593, 597-9 (1960); *John Wiley & Sons, Inc.* v. *Livingston*, 376 U.S. 543, 557 (1964); *Warren Brothers Co.* v. *Cardi Corp.*, 471 F.2d 1304, 1309 (1st Cir. 1973); *Advance Publications Inc.* v. *Newspaper Guild*, 616 F.2d 614, 617 (2d Cir. 1980); *Andros Compania Maritima, S.A.* v. *Marc Rich & Co.*, 579 F.2d 691, 704 (2d Cir. 1978); *Radio Corp.* v. *Association of Professional Engineering Personnel*, 291 F.2d 105, 109 (3d Cir.), *cert. denied*, 368 U.S. 898 (1961); *Lodge No. 12, Dist. No. 37, Int'l Ass'n of Machinists* v. *Cameron Iron Works, Inc.*, 292 F.2d 112, 117 (5th Cir.), *cert. denied*, 368 U.S. 926 (1961); *Smith* v. *Union Carbide Corp.*, 350 F.2d 258, 260-1 (6th Cir. 1965).

Petitioners would assign error to the courts' refusal to review the merits of the arbitration by arguing that it was for the judiciary to decide whether the dispute should be heard by the EHP or in accordance with arbitration provisions of local contracts.[3] This, of course, would involve re-trying the merits, which the court would not do. Whether the union was correct that gang size and composition were governed by the Master Contract or management was correct that local contracts controlled, the fact remained that the dispute was still over the Containerization Provisions, and the parties had agreed to arbitrate *all* disputes over the Containerization Provisions before the EHP,—not before local tribunals and not before the courts.[4]

The district court and the Second Circuit, then, were eminently correct in finding an agreement to submit the issue in this case to arbitration before the EHP and in refusing to disturb the panel's decision. But, even if the lower courts had committed error, this would still not give rise to the kind of important question that warrants review by the Supreme Court. The law in this area is so well

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[3] Petitioners' argument that the "18 + 2" dispute must be arbitrated under local contracts has been rejected in related litigation by 3 other circuits. *Hampton Roads Shipping Ass'n* v. *International Longshoremen's Ass'n*, 746 F.2d 1015 (4th Cir. 1984); *West Gulf Maritime Ass'n* v. *ILA Deep Sea Local 24*, 751 F.2d 721 (5th Cir. 1985); *S.E.L. Maduro (Fla.), Inc.* v. *International Longshoremen's Ass'n*, No. 84-5639 (11th Cir. July 16, 1985) (available Aug. 8, 1985 on LEXIS, Genfed library, cases file); *South Carolina Stevedores Ass'n* v. *Local No. 1422, Int'l Longshoremen's Ass'n*, No. 84-2189 (4th Cir. June 19, 1985) (available Aug. 8, 1985 on LEXIS, Genfed library, cases file).

[4] In the classic tradition of disappointed litigants, petitioners argue that the EHP's interpretation involved a "change" in the contractual agreements and "resulted in a contract to which no party ever agreed." Pet. at 12-15. Petitioners contend that subsequent local contracts modified ¶ 5 of the Containerization Provisions. Significantly, what petitioners do not, and can not, claim is any modification of the agreement to arbitrate all containerization disputes before the EHP. The effect of any local contracts on ¶ 5, then, remains for the panel to decide.

established as to be etched in black letters. There is no conflict or misunderstanding among the lower courts. An occasional isolated error, if there were one, hardly should command the energies of this Court to correct it.

Though the petition purports to raise "Recurring Issues of National Scope and Importance," Pet. at 15, the reader looks in vain for any issues of law. There is an attempt, perhaps in hopes of whetting some interest, to raise an exaggerated—and irrelevant—spectre of additional costs being passed on to the public. There is an ill-concealed attempt to have this Court re-try the merits of the dispute before the EHP. But there is no legal question requiring clarification by the highest tribunal. The disappointment of a losing party is no more ground for this Court to grant certiorari than it is for lower courts to substitute their judgment for that of the arbitrators.

Dated: New York, New York
August 8, 1985

Respectfully submitted,

/s/ THOMAS W. GLEASON

THOMAS W. GLEASON
90 Broad Street, Suite 600
New York, New York 10004
(212) 425-3240

Attorney for Respondent

Of Counsel:

ERNEST L. MATHEWS, JR.
SUSAN G. BARRES

a. The origin of the container.

b. The name of the shipper.

c. The identity of the inland carrier delivering such cargo.

d. The name or names of the persons from whom the cargo is received, if other than the person named in "b." above and location of pickup.

e. The weight of the cargo.

f. A description of the cargo.

g. The final port of discharge of the container.

3. In trades in which outward foreign manifests are maintained, copies of such outward foreign manifests shall be made available for inspection. In all other cases, copies of the Bills of Lading shall be made available.

4. An historical file on each container shall be made available to show the movement of the container at any time period in question.

5. The above documentation shall be maintained for a period of six months from the date of sailing of the vessel.

C.) In addition to all of the above, the provisions of Rule 9 shall be strictly adhered to by all Carriers and Direct Employers. Obligations of a carrier provided for herein may be carried out by any agent designated by the carrier, including a direct employer or terminal operator.

3. MANAGEMENT-ILA EMERGENCY HEARING PANEL

The Management-ILA Emergency Hearing Panel shall also act as the Management-ILA Container Committee and all provisions of the June 19, 1981 Agreement dealing with the implementation and enforcement of the Containerization Agreement shall apply to implementation and enforcement of the Rules on Containers.

4. QUICK RESOLUTION—TELEPHONIC HEARINGS

A.) Where either the President of the ILA or the President of New York Shipping Association determines that speedy hearing and resolution of any issue under either the Rules on Containers or the Containerization Agreement is necessary, notice of meeting of the Executive Committee of the Management-ILA Emergency Hearing Panel must be called on twenty-four (24) hours telephonic notice. The Executive Committee of the Management-ILA Emergency Hearing Panel shall consist of the President of the NYSA, President of CONASA, President of the West Gulf Maritime Association and the President of the New Orleans Steamship Association, together with a Carrier member and a Direct Employer member of the Carriers Container Council.

B.) On the Union side, the Executive Committee shall consist of the President of the ILA, the Executive Vice President, the Secretary-Treasurer, the General Organizer, the Assistant General Organizer, and the President of the South Atlantic and Gulf Coast District.

C. Wherever practicable, hearings may be held in the port or ports where problems requiring speedy resolutions arise. Hearings may be held by telephone provided that at least three (3) representatives on each side are physically present at the meeting with any other representatives desiring to attend being present by telephone. The proceedings shall be conveyed to all members of the Executive Committee by telephone and all members of the Executive Committee may ask questions, confer and otherwise participate in the deliberations by the Executive Committee by telephone. A determination by the Executive Committee shall be rendered immediately by majority vote of the Executive Committee, each side having an equal number of votes without regard to the number of persons present. Such determination shall be final and binding, although any aggrieved party shall have the right to appeal the decision of the Executive Committee to the full Management-ILA Emergency Hearing Panel. Pending such appeal, the

determination of the Executive Committee shall immediately become effective and remain effective unless and until reversed by the full Panel. In the event of deadlock, the matter shall be referred to the full Panel for determination under provisions of the June 8, 1981 Agreement.

5. THE RIGHT TO STRIKE

The ILA shall have the right to refuse to render service to any carrier or direct employer who fails or refuses to abide by the decisions of the Committee or Panel after having been found to have violated any provisions of the Containerization Agreement until said carrier or direct employer comes into full compliance with said decision. The provisions of any "no strike" clause shall not be applicable in any such situation.

6. TARIFFS INAPPLICABLE

No carrier shall seek to justify any violation of the Rules on Containers or the Containerization Agreement on the grounds that its conduct is required by tariff provisions adopted by such carrier or by a conference of which said carrier is a member. Each carrier shall have an obligation to have any tariff provisions or allowances in conflict with the Rules on Containers or the Containerization Agreement changed as soon as possible consistent with the requirements of law.

7. LTL/LCL CARGO

LTL/LCL cargo subject to the Rules on Containers shall be brought to the pier in breakbulk form or loose form.

8. NO CONTAINERS TO CONSOLIDATORS

No steamship carrier shall supply any container, chassis or bogey, to an NVO or consolidator within the 50 mile zone and any such conduct shall be deemed a per se violation of the Rules on Containers and the carrier shall pay liquidated damages pursuant to paragraph 9.

9. LIQUIDATED DAMAGES

Liquidated damages as provided under Rule 7(c) of the Rules on Containers shall be applied in case of every violation of the Rules or of the Containerization Agreement, on and after May 26, 1983. Where the Executive Committee or full Panel determines that such violation has been willful, the amount of the liquidated damages shall be doubled. Evidence of willfulness shall include a change in the documentation relating to any container which has been made for the purpose of either evading the Rules or hiding evidence that the Rules have been violated.

10. CONTINUATION OF AGREEMENT

Except as modified by the above, the Master Agreement of May 27, 1980 shall continue, as amended, in full force and effect, including and without limitation the provisions of paragraph "8" of the Containerization Agreement. The Master Agreement to become effective October 1, 1983 shall include all provisions of the Containerization Agreement and Rules on Containers, as well as other agreements, together with amendments and including this procedural understanding.

IN WITNESS WHEREOF the parties hereto have set their hand this 29th day of July, 1983.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO

By /s/ (illegible)
President

ATLANTIC COAST DISTRICT
ILA, AFL-CIO

By /s/ (illegible)
President

By /s/ (illegible)
Secretary

SOUTHEAST FLORIDA EMPLOYERS ASSOCIATION

By /s/ (illegible)
President

By /s/ (illegible)
Secretary

SOUTH ATLANTIC EMPLOYERS NEGOTIATING COMMITTEE

By /s/ (illegible)
Chairman

CARRIERS CONTAINER COUNCIL

By /s/ (illegible)
Chairman

SOUTH ATLANTIC AND GULF
DISTRICT, ILA, AFL-CIO

By /s/ (illegible)
President

By /s/ (illegible)
Secretary

NEW YORK SHIPPING
ASSOCIATION, INC.

By /s/ (illegible)
President

COUNCIL OF NORTH ATLANTIC
SHIPPING ASSOCIATIONS

By /s/ (illegible)
President

WEST GULF MARITIME
ASSOCIATION

By /s/ (illegible)
President

NEW ORLEANS STEAMSHIP
ASSOCIATION

By /s/ (illegible)
President

MOBILE STEAMSHIP ASSOCIATION

By /s/ (illegible)
President

By /s/ (illegible)
Secretary